Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

JAMES NEWSOME,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether damages can be awarded against police officers under 42 U.S.C. § 1983 for depriving an accused of his right to a fair trial by failing to disclose exculpatory information to prosecutors.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago, Helen McCabe (as personal representative of the estate of John McCabe), and Raymond McNally. The respondent is James Newsome.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of Chicago, Helen McCabe (as personal representative of the estate of John McCabe), and Raymond McNally, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit (App., *infra* at 1a-21a) are reported at 319 F.3d 301 (7th Cir. 2003); 260 F.3d 824 (7th Cir. 2001); and 256 F.3d 747 (7th Cir. 2001). The pertinent opinions of the district court (App., *infra* at 22a-91a), are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 10, 2003. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Section 1 of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

STATEMENT

In this case, the court of appeals upheld a $15 million judgment against two Chicago police detectives, concluding that the detectives were liable for the unconstitutional conviction of respondent James A. Newsome ("Newsome") by failing to disclose exculpatory evidence to the prosecutors handling the underlying criminal case against Newsome.

1. In October 1979, Edward "Mickey" Cohen ("Cohen") was fatally shot during a robbery at his grocery store. App., *infra* at 10a. In September 1980, Newsome was convicted of Cohen's murder. *Id.* Newsome's conviction was based

largely on the testimony of three eyewitnesses, Josie Nash ("Nash"), Anthony Rounds ("Rounds"), and John Williams ("Williams"). App., *infra* at 2a-3a. Nash and Rounds were in Cohen's grocery store at the time of the shooting, and Williams bumped into a man matching the killer's description outside the store shortly before the shooting. Tr. 126, 186, 816-23. All three witnesses identified Newsome as the killer, first from a police lineup and later at Newsome's criminal trial. App., *infra* at 2a-3a; Tr. 120, 126, 129-30, 145, 193, 818, 824, 845. The evidence introduced at the murder trial also showed, however, that fingerprints found on grocery items touched by the killer were not Newsome's. Tr. 900.

In 1995, the Governor of Illinois pardoned Newsome after a new computerized fingerprint identification system enabled the Chicago Police Department to compare the fingerprints found at the crime scene to all prints on file with the Department and identify the fingerprints as belonging to a convicted murderer named Dennis Emerson. App., *infra* at 1a; Tr. 342-50.

2. Newsome brought this suit against Chicago police detectives John McCabe and Raymond McNally, who had arranged the lineup identification procedure at which Nash, Rounds, and Williams identified him as Cohen's killer. App., *infra* at 11a. Newsome alleged that Detectives McCabe and McNally were liable for a malicious prosecution in violation of his constitutional rights and sought relief under 42 U.S.C. § 1983 (2000). App., *infra* at 10a-11a.

The detectives moved for summary judgment on the ground of qualified immunity. *See* App., *infra* at 22a-23a, 54a. The district court denied the motion, ruling that evidence that the detectives had encouraged the witnesses to select Newsome from the lineup but failed to tell the prosecutors about the circumstances underlying the lineup identifications was sufficient to support section 1983 liability for a malicious prosecution under clearly established law in

1979 and 1980. See App., *infra* at 56a. On the detectives' interlocutory appeal, the court of appeals rejected the theory of malicious prosecution on which the case had been brought, concluding that section 1983 does not recognize the theory of malicious prosecution on which the district court and Newsome had relied. App., *infra* at 12a-16a. Nevertheless, the court upheld the denial of qualified immunity, holding that the detectives could be held liable for depriving Newsome of his due process right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. App., *infra* at 16a-18a. The court held that the detectives could be legally responsible for depriving Newsome of his constitutional right to a fair trial if they had encouraged the eyewitnesses to select Newsome from the lineup "yet withheld from prosecutors information about the coaching of the witnesses and the fact that these witnesses earlier selected pictures from a book of mug shots that did not contain Newsome's photo." App, *infra* at 11a.[1] The court also concluded that such conduct would have violated clearly established law at the time of Newsome's prosecution: "The *Brady* principle was announced in 1963, and we applied it in *Jones* [*v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988)] to affirm a hefty award of damages against officers who withheld exculpatory information in 1981," App., *infra* at 17a-18a.

The detectives filed a petition for rehearing, arguing that the obligation to disclose exculpatory evidence to the defense that was recognized in *Brady* is applicable to prosecutors, not police. App., *infra* at 19a. The court of appeals denied the petition in a supplemental opinion, explaining that "if the right characterization of the defendants' conduct is that they

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[1] The court also held that the detectives could be liable if they withheld from prosecutors exculpatory information relating to the fingerprints found at the scene. App., *infra* at 11a.

deliberately withheld information, seeking to misdirect or mislead the prosecutors and the defense, then there is a genuine constitutional problem." App., *infra* at 20a.

3. After the case returned to the district court, Newsome amended his complaint to advance the due process theory that had been fashioned by the court of appeals. App., *infra* at 67a. His amended complaint was met by a motion asserting absolute immunity from liability on that theory. App., *infra* at 66a. The district court ruled that the allegations in the complaint that the detectives suborned and conspired to procure perjurious testimony against Newsome were barred by absolute immunity, but that absolute immunity did not reach allegations that the detectives had deliberately concealed exculpatory evidence. App., *infra* at 66a-70a.

At trial, Newsome testified that he saw Detectives McCabe and McNally point and gesture at him while Nash viewed the lineup. Tr. 539. Rounds, who admitted that he had participated in the creation of a composite sketch of the killer prior to the lineup, Tr. 188, 204-06, nevertheless testified that when he first viewed the lineup, he told the detectives that he had never seen the killer's face and identified Newsome only because the detectives urged him to "focus on No. 3" (Newsome) and told him that they had evidence that "No. 3" was the killer. Tr. 190-94, 21-12.[2] When asked why he had not told the prosecutors that he had not really seen the man who murdered Cohen, Rounds answered: "Because I was told by the police I would be charged with perjury or something or contempt of court." Tr. 194. Rounds's account of coaching by the detectives was impeached with his testimony from the criminal proceedings, where he had testified that the police

[2] The detectives' testimony was that they had no independent recollection of the circumstances underlying the lineup identifications occurring more than 20 years earlier. Tr. 343-47, 877-89. The pertinent police report they filed says nothing about what may have preceded the witnesses' identifications. Tr. 404-09.

did not say anything to him while he viewed the lineup other than to take his time, look closely, and let them know if he recognized anyone. Tr. 211-15, 238-40. The evidence further showed that Nash (who had died by the time of the civil trial) had testified during the criminal proceedings that no one had told her whom to identify from the lineup and that the police had said nothing to her during the lineup other than to tell her to take her time. Tr. 174, 182. Finally, the evidence showed that, prior to the criminal trial, the prosecutors had interviewed each of the eyewitnesses individually—out of the presence of the detectives—and that no witness had told the prosecutors that the police had instructed him or her whom to pick from the lineup. Tr. 895-98.[3]

The jury was instructed that it could find the detectives liable for violating Newsome's constitutional rights if it found that the detectives "deliberately concealed or failed to disclose . . . exculpatory evidence . . . ." Tr. 1133. The jury awarded Newsome $15 million in compensatory damages. App., *infra* at 2a.[4]

4. The court of appeals affirmed. On the detectives' arguments in support of their claim to qualified immunity, the court held that the detectives had "preserved them for

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[3] The evidence at trial also showed that much of the exculpatory information that the court of appeals speculated in the interlocutory appeal might have been suppressed by the detectives was in fact disclosed during the criminal proceedings. For example, the evidence showed that Detective McCabe disclosed that the detectives had shown Williams a photo array containing Newsome's photograph prior to the lineup. Tr. 871-72. Similarly, the evidence showed that, although Nash and Rounds may have identified someone other than Newsome when viewing mug books, that fact was also fully disclosed to the defense during the criminal proceedings. Tr. 110-13, 136-39, 163-64, 871-72. Finally, Newsome never alleged that the detectives had withheld any exculpatory information relating to the fingerprints, and no such claim was pressed at trial.

[4] The district court subsequently awarded Newsome $837,533.27 in attorney's fees and $12,382.75 in costs. R. 291.

presentation to a higher court, but in this tribunal they are barred by the law of the case." App., *infra* at 2a. And, on the detectives' claim to absolute immunity for their role in procuring testimony that was ultimately used to convict Newsome, the court ruled that the defense was inapplicable because the detectives "were not held liable for conspiring with the eyewitnesses to commit perjury." App., *infra* at 5a. Instead, the court concluded that liability attached because the detectives "concealed exculpatory evidence—the details of how they induced the witnesses to finger Newsome." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents issues of recurring importance concerning the circumstances under which an accused may recover damages from police officers for a subsequently vacated conviction. The lower courts have struggled unsuccessfully to reach a uniform approach to these issues, and there is considerable disarray in the circuits on the question presented in this petition. The need for this Court's guidance is urgent. Given the advent of DNA testing to overturn criminal convictions years or even decades after a criminal trial, litigation challenging assertedly wrongful convictions is burgeoning. Moreover, the stakes for the parties, and for the taxpayers as well, are quite high in these cases; here the jury assessed the damages for wrongful confinement at $1 million per year. This Court should clarify the standards governing these cases before too much more litigation is undertaken under liability and immunity rules that may well prove to be erroneous and that vary considerably between circuits.

1. As one Member of this Court has observed, a section 1983 claim against police officers based on an assertedly unconstitutional prosecution "is anomalous," since "[t]he principal player in carrying out a prosecution . . . is not police officer but prosecutor." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring). The disarray in the lower

courts in cases seeking damages for assertedly unconstitutional prosecutions and convictions reflects the difficulty in framing and analyzing this type of claim.

a. This Court first confronted the question whether federal law provides a remedy for an assertedly unconstitutional prosecution in *Albright*. In that case, a section 1983 action seeking damages for an allegedly wrongful prosecution that was terminated prior to trial, five Members of this Court rejected the Due Process Clause as a basis to sue police officers for an unconstitutional prosecution, reasoning that deprivations of liberty accompanying the initiation of criminal proceedings are governed by the Fourth Amendment and not the Due Process Clause. See 510 U.S. at 274-75 (plurality opinion); *id.* at 290-91 (Souter, J., concurring in the judgment). Six Members of the Court added that the question whether a due process section 1983 claim is available to a plaintiff who alleges that he was deprived of his constitutional right to a fair trial was not presented by that case. See *id.* at 273 n.6 (plurality opinion); *id.* at 818 (Kennedy, J., concurring in the judgment).

In the wake of *Albright*, the courts of appeals have diverged sharply on the standards governing section 1983 claims seeking damages against police officers for assertedly unconstitutional prosecutions and convictions. In this case, the Seventh Circuit held that, although a malicious prosecution claim arising from an unconstitutional prosecution and conviction can be based on the Fourth Amendment, such a claim accrues at the time an accused is first taken into custody, and for that reason Newsome's Fourth Amendment claim was barred by the statute of limitations. App., *infra* at 16a. Following the analysis offered by two Members of the Court in *Albright*, the court of appeals also held that no procedural due process claim was available to Newsome because Illinois tort law provided Newsome with all the process that he was due. App., *infra* at 14a (citing *Albright*,

510 U.S. at 281-86 (Kennedy, J., concurring in the judgment)). The Seventh Circuit also concluded, however, that Newsome could assert "a due process claim in the original sense of that phrase" because "he did not receive a fair trial if the prosecution withheld material exculpatory details." App., *infra* at 16a. This conclusion finds no universal acceptance in the circuits.

In fact, of the eight circuits to address these types of claims, only two have held that a section 1983 claim seeking damages for an unconstitutional prosecution and conviction may be based on constitutional provisions other than the Fourth Amendment. The Third Circuit has recognized a section 1983 malicious prosecution claim based on "police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit test of the Constitution." *Torres v. McLaughlin*, 163 F.3d 169, 173 (3d Cir. 1998), cert. denied, 528 U.S. 1079 (2000). The Sixth Circuit has similarly held that, although a section 1983 malicious prosecution claim may be based on the Fourth Amendment, the claim may be pursued under the substantive component of the Fourteenth Amendment in cases where the violation of Fourth Amendment rights is not at issue. See *Frantz v. Village of Bradford*, 245 F.3d 869, 875-77 & n.2 (6th Cir. 2001).

By contrast, six circuits have interpreted *Albright* to require that claims like the one Newsome originally brought, alleging a malicious prosecution unsupported by probable cause, be analyzed under the Fourth Amendment and not the Due Process Clause, although these circuits are themselves split on whether this claim can be based exclusively on the Fourth Amendment or must also allege the elements of the state-law tort of malicious prosecution. The First, Second, Tenth, and Eleventh Circuits have indicated that, to sue police officers for their role in inducing prosecutors to bring a criminal case, a section 1983 plaintiff must prove a Fourth Amendment violation plus all of the elements of the state-law tort of

malicious prosecution. See *Fulton v. Robinson*, 289 F.3d 188, 195 (2d Cir. 2002); *Nieves v. McSweeney*, 241 F.3d 46, 53-54 (1st Cir. 2001); *Uboh v. Reno*, 141 F.3d 1000, 1002-04 (11th Cir. 1998); *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir.), cert. denied, 519 U.S. 871 (1996). The Fourth Circuit has held that the plaintiff must prove a Fourth Amendment seizure plus the termination of the prior criminal proceedings in a manner favorable to the plaintiff. See *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001). And the Fifth Circuit has held that the plaintiff must prove the requirements of the state-law tort and no more. See *Castellano v. Fragozo*, 311 F.3d 689, 698-99 (5th Cir. 2002), rehearing en banc granted, 321 F.3d 1203 (5th Cir. 2003).

b. Not only is there disarray in the lower courts about how a section 1983 claim against police officers for an allegedly wrongful prosecution and conviction should be treated, but there is also considerable disagreement about the particular theory of due process liability utilized by the Seventh Circuit in this case.

To support its view of due process liability in this case, the Seventh Circuit relied on the responsibility imposed on prosecutors in *Brady v. Maryland*, 373 U.S. 83 (1963), "for learning of and disclosing all exculpatory evidence known to the police." App., *infra* at 16a. Although acknowledging that *Brady* articulates a prosecutorial and not investigative responsibility, the court believed that police could be taxed with liability under *Brady*:

> If officers are not candid with prosecutors, then the prosecutors' decisions—although vital to the causal chain in a but-for sense—are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their conduct with or without

> legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution.

App., *infra* at 17a. Thus, the court held that *Brady* imposes a duty of disclosure on police officers not to "withhold from prosecutors exculpatory information." *Id.* By holding that police can be held liable whenever they "withhold from prosecutors exculpatory information" (*id.*), the court of appeals effectively imposed a duty of disclosure on police—because whenever they fail to ensure that all exculpatory information comes to the attention of prosecutors, a trier of fact will be free to hold investigators liable for a *Brady* violation.

The Seventh Circuit's extension of the *Brady* obligation to police is inconsistent with *Brady* itself. The obligation imposed by *Brady* rests with prosecutors, not the police. This Court has explained that while *Brady* applies to information known to the police, it is the duty of the prosecutor, not the police officer, to identify and disclose exculpatory evidence known to investigators: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitely*, 514 U.S. 419, 437 (1995). Accord, *e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). And this view of the *Brady* obligation makes good sense. Police officers are not lawyers; they have limited ability to discern what evidence might be considered impeaching or otherwise exculpatory at trial.

Following this analysis, the Fifth Circuit has squarely held that the duty to disclose exculpatory evidence recognized in *Brady* does not extend to police officers. In *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001), cert. denied, 535 U.S. 1055 (2002), the plaintiff, whose murder conviction had been overturned, sought civil damages from a police

officer and police lab technician based upon a claim that the defendants had violated their *Brady* duty "to disclose exculpatory evidence." *Id.* at 277. The court flatly rejected the plaintiff's claim, stating that there exists "no case extending *Brady* to police officers or lab technicians." *Id.* at 278. Along the same lines, six judges of the Fourth Circuit have concluded that "to speak of the duty binding police officers as a *Brady* duty is simply incorrect." *Jean v. Collins*, 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in the judgment), cert. denied, 531 U.S. 1076 (2001). The opinion elaborates:

> The *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context. To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor's *Brady* duty would thus improperly mandate a one-size-fits-all regime.

Ibid. See also *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992), cert. denied, 507 U.S. 961 & 972 (1993).

To be sure, we do not doubt that a police officer can be held liable when he deliberately obstructs a prosecutor's effort to identify and disclose exculpatory information known to the police. This is the standard that a number of circuits have articulated for imposing liability on police officers for a malicious prosecution based on police suppression of exculp-

atory evidence. See, *e.g.*, *Gallo v. City of Philadelphia*, 161 F.3d 217, 218-22 (3d Cir. 1998); *Hart v. O'Brien*, 127 F.3d 424, 446 (5th Cir. 1997); *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 358 (6th Cir. 1997). And, in the particular context of a *Brady* claim against police officers, six judges of the Fourth Circuit have concluded that a plaintiff must prove "concealment, doctoring, or destruction of evidence . . . ." *Jean*, 221 F.3d at 663 (Wilkinson, J., concurring in the judgment). There is no basis, however, to hold, as the Seventh Circuit did here, that a police officer has deprived an accused of his right to a fair trial merely because they have "withh[e]ld from prosecutors exculpatory information . . . ." App., *infra* at 17a.

In response to the Seventh Circuit's original opinion in the interlocutory appeal, we petitioned for rehearing, arguing that only affirmative obstruction of the prosecution's investigation can be enough to impose liability on a police officer for depriving an accused of the right to a fair trial. In its supplemental opinion denying rehearing, however, the court of appeals still failed to articulate the proper standard. While the court acknowledged that "police need not spontaneously reveal to prosecutors every tidbit that with the benefit of hindsight (and in the context of other evidence) could be said to assist defendants" (App., *infra* at 19a-20a), it added that the withholding of information, at least when deliberate, is sufficient to impose liability: "[I]f the right characterization of the defendants' conduct is that they deliberately withheld information, seeking to misdirect or mislead the prosecutors and the defense, then there is a genuine constitutional problem," App., *infra* at 20a. But, however tempting it may have been for the court of appeals to impose liability based on what it deemed to be bad faith by police, that approach has no support in *Brady*.

Brady and its progeny make motivation irrelevant; the Due Process Clause forbids convictions that rest on the suppres-

sion of exculpatory evidence regardless of whether the failure to disclose was innocent or in bad faith. See, *e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady*, 373 U.S. at 87. The absolute nature of the *Brady* obligation imposed on prosecutors appropriately protects the right to a fair trial even with respect to information known only to the police, since "[t]he prosecutor bears the responsibility for implementing procedures designed to ensure that police officers turn over all evidence to him." *Jean*, 221 F.3d at 661 (Wilkinson, J., concurring in the judgment) (citation omitted). It follows that, regardless of their motives, if the police do nothing to prevent prosecutors from discharging their obligation to identify and disclose exculpatory information, they do not run afoul of *Brady*. But, by making liability turn on investigators' subjective motivation, as the Seventh Circuit has done, the trier of fact is left free to infer an improper motive in virtually every case in which the police fail to disclose exculpatory information to the prosecutors, even in cases like this one, in which there is no evidence that the detectives provided any false information to the prosecutors about any coaching that may have preceded the eyewitnesses' identification of Newsome. Indeed, here there is no evidence that the prosecutors ever interviewed the detectives about allegations of impermissible coaching—an omission that is understandable given Newsome's failure to press any claim of impermissible coaching during pretrial hearings in the underlying criminal case. In fact, it was some two decades after trial that Newsome first advanced his claim that he saw the detectives coaching Nash as she viewed the lineup.

c. By establishing an improper standard for due process liability, the court of appeals' holding in the interlocutory appeal required the detectives to go to trial under that improper standard—the district court's instructions to the jury did not require a finding that Detectives McCabe and McNally affirmatively obstructed the prosecutors from discharging their own *Brady* obligation. Instead, following

the court of appeals' erroneous holding, the district court charged the jury that it could return a verdict for Newsome as long as it found that the detectives "deliberately concealed or failed to disclose . . . exculpatory evidence . . . ." Tr. 1133. And, the court of appeals, in its opinion upholding the jury's $15 million award, refused to retreat from its prior position, concluding that we had preserved our arguments "for presentation to a higher court, but in this tribunal they are barred by the law of the case." App., *infra* at 2a.[5] And while the court of appeals noted that Rounds' testimony at trial about the detectives' "perjury or contempt" warning suggested that "the officers threatened him with imprisonment if he told the prosecutors what actually happened at the lineup" (App., *infra* at 3a), we cannot know whether the jury credited this testimony, since its instructions did not require it to find that detectives obstructed the prosecutors' efforts to discharge their *Brady* obligations. In any event, as we note above, there was no evidence that the prosecutors even inquired into the circumstances surrounding the identifications, much less evidence that their inquires were frustrated by police misconduct.

d. In fact, under the proper standard, this case never should have gone to trial; the court of appeals should have granted the detectives qualified immunity in its first opinion.[6]

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[5] While the law of the case established by the court of appeals in the interlocutory appeal bound the district court, and was followed by the Seventh Circuit in the subsequent appeal, "a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).

[6] This petition for certiorari properly places at issue the decision of the court of appeals in the interlocutory appeal, since this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Accord, *e.g.*, *Mercer*

Public officials are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A court considering a claim for qualified immunity should therefore "determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818. Accord, *e.g.*, *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001); *Wilson*, 526 U.S. at 609. In this case, the court of appeals denied qualified immunity by citing two precedents, *Brady* and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). But *Brady* is of no relevance to the qualified immunity inquiry because *Brady* imposes no obligations on police officers, as we explain above.

As for *Jones*, in that case the Seventh Circuit discussed *Brady* in the course of evaluating the claim against the City itself, based on a police practice of maintaining "street files" that were unavailable to prosecutors. See 856 F.2d at 995-96.[7] But the court cautioned that it "d[id] not reach the

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v. Theriot, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). Indeed, it is the ordinary practice of this Court to forgo review prior to final judgment, notwithstanding this Court's jurisdiction to review interlocutory judgments. See, *e.g.*, *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

[7] In *Jones*, the plaintiff's claims did not rest on the right to a fair trial, since the charges against him were dropped before his trial concluded. See 856 F.2d at 991. And, against the individual officers, *Jones* recognized only a Fourth Amendment claim based on Jones' arrest without probable cause, and did not establish a legal obligation on police officers to disclose exculpatory evidence. See *id.* at 992. Nor did the court have any occasion to consider whether or when any *Brady* obligation on police officers had been sufficiently clearly established to deny qualified immunity in *Jones*. The *Brady* claim was made only against the City

question whether damages could ever be awarded for . . . a [*Brady*] violation." *Id.* at 996. More important, *Jones* was not decided until some nine years after the events at issue here, and hence could not have established the scope of the *Brady* obligation as of the time of Newsome's prosecution. Instead, at that time, police detectives reasonably could have believed that it was the responsibility of the prosecutors, not the officers themselves, to determine if eyewitness identifications were sufficiently reliable for use at trial and, if so, whether any exculpatory information relating to those identifications must be disclosed to the defense. After all, it was settled in 1979 that even when a lineup identification is tainted by impermissible coaching, in-court identifications are admissible if the witness has an independent basis on which to make the identification. See, *e.g.*, *Manson v. Braithwaite*, 432 U.S. 98 (1977). Thus, if during the lineup the detectives engaged in impermissible coaching, or worse, they could nevertheless have reasonably believed that the prosecutors might independently find the eyewitness testimony sufficiently reliable to use against Newsome, and they were not on fair notice that they faced liability if a trier of fact concluded that they had "deliberately" withheld exculpatory evidence.

Nor does the testimony that the court of appeals identified as suggesting that the detectives threatened Rounds (App., *infra* at 3a) suffice to deprive them of qualified immunity. Rounds' brief testimony on this point does not describe any express threat or demand that Rounds not tell prosecutors the truth. The detectives' statement, by its terms, was only a warning that if Rounds recanted his identification—by testifying that Newsome was not the man he saw murder Cohen or refusing to testify altogether—he would face perjury or

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itself (see *id.* at 995-96), and municipalities may not assert the defense of qualified immunity. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

contempt charges. This type of warning is frequently given to witnesses—especially potentially recalcitrant witnesses to violent crimes—advising them that if they alter their account, they may be charged with perjury, and if they refuse to testify, they may face contempt charges. While Rounds evidently construed the warning as a threat or demand that he lie to prosecutors, that is not sufficient to impose liability. Certainly no precedent available at the time of Newsome's prosecution would have put the detectives on fair notice that the type of warning described by Rounds violated the Due Process Clause.

Even more important, the extent to which police officers can be charged with knowledge of their own constitutional obligation under *Brady* is a point on which there is considerable disarray, if not outright conflict, in the lower courts. As we explain above, the Fifth Circuit has stated that it is aware of "no case extending *Brady* to police officers." *Mowbray*, 274 F.3d at 278. And six judges of the Fourth Circuit, after surveying the precedents around the country, including the Seventh Circuit's decision in *Jones*, concluded that the "cases have left unclear the exact nature of any duty that the law imposes on police with respect to exculpatory evidence." *Jean*, 221 F.3d at 659 (Wilkinson, J., concurring in the judgment). Thus, the disarray in the lower courts on whether police officers are under any clearly established *Brady* obligation warrants plenary review of the Seventh Circuit's decision in this case.

2. There is also disarray in the lower courts on the question whether investigators are entitled to absolute immunity for procuring testimony subsequently proven to be false. On this issue as well, plenary review is warranted.

a. Police officers are entitled to absolute immunity from civil liability when they undertake "functions 'intimately associated with the *judicial* phase of the criminal process.'" *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (quoting *Imbler v.*

Pachtman, 424 U.S. 409, 430 (1976)). One such function is testifying; in *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that police officers have absolute immunity from civil liability for their allegedly false or perjurious testimony. See *id.* at 342-44. The lower courts, however, have struggled without success to develop a uniform approach to the application of absolute immunity to pretrial conduct that culminates in testimony later found to be false or perjurious.

In the decision below, the court of appeals held that the detectives lacked absolute immunity because "their liability is under the due process clause because they concealed exculpatory evidence—the details of how they induced the witnesses to finger Newsome." App., *infra* at 5a. That holding is in conflict with the decision in the First Circuit in *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993), that absolute immunity reached allegations of an effort to "withhold material evidence from the court . . . ." *Id.* at 9. In fact, the conflict in the circuits is not limited to the precise question whether absolute immunity extends to allegations about the withholding of material evidence; the circuits have been unable to agree on a variety of issues involving the application of absolute testimonial immunity to pretrial conduct.

For example, in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), the Eleventh Circuit held that a police detective's alleged subornation of perjury by a civilian witness was protected by absolute immunity. See *id.* at 1288-89. As the court explained, "[t]o allow a § 1983 claim based on the subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front." *Id.* at 1289. By contrast, in *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), in which the plaintiff alleged that a deputy sheriff suborned perjurious testimony from a witness (see *id.* at 1002), the Sixth Circuit rejected the deputy's claim to absolute immunity, concluding

that the fact that the deputy pressured a witness named Apple to testify falsely "ultimately resulting in absolutely immunized action—Apple's testimony—does not make those underlying actions covered by absolute immunity." *Ibid.* Thus, the Sixth and Eleventh Circuits cannot agree on whether subornation of perjury is immunized.

Similarly, there is a conflict on whether a pretrial conspiracy to present perjured testimony is immunized. Some nine circuits have recognized immunity in these cases. See *Mowbray*, 274 F.3d at 277; *Franklin v. Terr*, 201 F.3d 1098, 1101-03 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d at 1288-89; *Hunt v. Bennett*, 17 F.3d 1263, 1267-68 (10th Cir.), cert. denied, 513 U.S. 832 (1994); *Watterson*, 987 F.2d at 9; *McArdle v. Tronetti*, 961 F.2d 1083, 1085-86 (3d Cir. 1992); *House v. Belford*, 956 F.2d 711, 720-21 (7th Cir. 1992); *Alioto v. City of Shiveley*, 835 F.2d 1173, 1174 (6th Cir. 1987); *Moses v. Parwatikar*, 813 F.2d 891, 892-93 (8th Cir.), cert. denied, 484 U.S. 832 (1987). For example, in *Mowbray*, the Fifth Circuit reasoned: "As a matter of logic, a person may not be prosecuted for conspiring to commit an act that he may perform with impunity." 274 F.3d at 277 (citation and internal quotations omitted). But the Second Circuit has reached a contrary conclusion, holding that persons who allegedly conspire to present false testimony do not receive immunity. See *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994); *San Filippo v. U.S. Trust Co. of New Jersey, Inc.*, 737 F.2d 246, 254-55 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985).

This case provides a useful vehicle to address the fundamental disagreement in the circuits about the scope of absolute immunity. The view in many circuits that since testimony itself is immunized, investigators cannot be sued for their role in facilitating the commission of an immunized act has been rejected by the Second, Sixth and Seventh

Circuits.[8] Plenary review is warranted to address the disarray in the lower courts on the application of absolute immunity to pretrial conduct aimed at producing testimony later found to be false, misleading or incomplete.

b. The approach to absolute immunity taken by the court of appeals in this case is also incorrect, for two reasons.

First, the acts for which the jury imposed liability qualify for absolute immunity because they involve "functions 'intimately associated with the *judicial* phase of the criminal process.'" *Malley*, 475 U.S. at 342 (quoting *Imbler*, 424 U.S. at 430). It is settled that prosecutors enjoy absolute immunity, despite their obligation under *Brady*, for "the alleged deliberate suppression of exculpatory evidence." *Burns v. Reed*, 500 U.S. 478, 486 (1991). See, *e.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 123-29 (1997); *Imbler*, 424 U.S. at 413-16, 430-31. This case involves the very same function; it went to trial on a claim that the detectives "concealed exculpatory evidence." App., *infra* at 5a. To the extent that the *Brady* obligation of prosecutors is extended to the police, surely they are exercising a function no less "intimately" associated with the judicial phase of the criminal process than when *Brady* is applied to prosecutors. Cf. *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring) (suggesting that if a section 1983 claim against police officers for malicious prosecution can be brought then officers "may be entitled to share the prosecutor's absolute immunity"). After all, the *Brady* obligation is not part of the investigative process; it is directed at "'the *judicial* phase of the criminal process.'" *Malley*, 475 U.S. at 342 (quoting *Imbler*, 424 U.S. at 430). That should be obvious in light of the rule that "suppression of evidence

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[8] For a helpful discussion (albeit predating the decision below) on the extent of the disarray in the lower courts on the scope of absolute testimonial immunity, see *Mitchell v. City of Boston*, 130 F. Supp. 2d 201, 209-13 (D. Mass. 2001).

amounts to a constitutional violation only if it deprives the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). Cf. *Landrigan v. City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("We do not see how the existence of a [falsely inculpatory] police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws.").

Second, the court of appeals' effort to distinguish between claims involving the procuring of false testimony and a failure to disclose exculpatory evidence is thoroughly unpersuasive. The Seventh Circuit held that "McCabe and McNally were not held liable for conspiring with the eyewitnesses to commit perjury; their liability is under the due process clause because they concealed exculpatory evidence." App., *infra* at 5a. This is little short of sophistry. Claims based on a police officer's subornation or participation in a conspiracy to adduce perjurious testimony can always be recharacterized as a claim for the failure to disclose exculpatory evidence—the exculpatory evidence being, of course, facts suggesting that a prosecution witness was induced to lie. Thus, a *Brady* exception to immunity would effectively swallow even the rule that a police officer's own testimony is immunized, since a section 1983 plaintiff can refashion even a claim based on alleged police perjury as a claim that the officer withheld exculpatory information.[9] This Court made that very point in *Imbler*, when it extended prosecutorial immunity not only to a prosecutor's

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[9] Indeed, the Seventh Circuit applies its *Brady* exception to absolute immunity even in cases in which it was the police officer's own testimony that was used to convict the criminal defendant turned section 1983 plaintiff. See *Ienco v. City of Chicago*, 286 F.3d 994, 1000 (7th Cir), cert. denied, 123 S. Ct. 581 (2002).

presentation of evidence, but also to the prosecutor's failure to disclose exculpatory evidence prior to trial. The Court reasoned:

> A claim of using perjured testimony may simply be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested . . . . Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

424 U.S. at 431 n.34. Indeed, the circuits that have extended absolute immunity to pretrial conduct have generally done so based on their recognition that an exception to immunity for pretrial conduct that is directed at procuring evidence for use at trial is likely, in practical effect, to swallow the rule. See, *e.g.*, *Mowbray*, 274 F.3d at 277; *Franklin*, 201 F.3d at 1101; *Jones*, 174 F.3d at 1289.[10]

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[10] The court of appeals also suggested that the detectives' conduct cannot be fairly characterized as producing an immunized act (the eyewitnesses' testimony) because "[b]y the time of trial, Rounds, Nash, and Williams may have sincerely believed that Newsome was the murderer" and therefore "[t]hey did not need immunity." App., *infra* at 5a. But this is just wrong. Absolute testimonial immunity is based on the privilege that the common law afforded witnesses against defamation liability. See *Briscoe*, 460 U.S. at 330-34. Under Illinois law, defamation liability attaches whenever an individual makes an unprivileged communication of a false and defamatory statement about another. See, *e.g.*, *Krasinski v. United Parcel Service, Inc.*, 530 N.E.2d 468, 490 (Ill. 1988). See also Restatement (Second) of Torts § 558 (1977). Alleging that the plaintiff has committed a crime is considered defamatory per se. See, *e.g.*, *Van Horne v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998). See also Restatement (Second) of Torts § 571 (1977). There is accordingly no basis for the court of appeals' view that the eyewitnesses had no need for immunity as long as they believed that their testimony was truthful; absent immunity, the witnesses faced defamation liability if their testimony was false in fact, regardless of whether they believed it to be true. In any event, the court of appeals' observation that the eyewitnesses may honestly have

3. The importance of the question presented by this case cannot be overstated.

In *Briscoe*, this Court predicted that if section 1983 plaintiffs could obtain damages against police officers based on their role in producing allegedly unconstitutional convictions—even if liability were limited to cases in which the conviction had already been overturned—the ensuing litigation would place enormous burdens on both the judicial systems and the law enforcement function. See 460 U.S. at 342-45. In particular, the Court observed that "police officers testify in scores of cases every year, and defendants will often transform resentment at being convicted into allegations of perjury by the state's official witnesses." *Id.* at 343. The Court added that cases alleging the use of false testimony will frequently require trial, since the complaint will be based on the defendants' "knowledge and state of mind," and "[s]ummary judgment is usually not feasible under these circumstances." *Id.* at 343 n.29. The holdings of the Seventh Circuit in this case impose the very type of burden from which this Court sought to spare the law enforcement community in *Briscoe*—those who are acquitted or whose convictions are overturned will frequently believe that the witnesses against them lied, and can circumvent both the witnesses' and the prosecutors' immunity by placing at issue the knowledge and intent of the investigators. The resulting civil litigation, based on allegations of wrongful failure to disclose exculpatory information to prosecutors, "could well

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believed their testimony in the criminal proceedings fails to take account of the irreconcilable conflict between that testimony and the testimony at the civil trial about improper coaching of witnessses. If Rounds' current testimony is credited, then his testimony in the criminal proceedings that the police engaged in no coaching is necessarily perjurious. And if Newsome's current testimony that he saw police coaching Nash is credited, then her testimony in the criminal proceedings that there was no coaching was likewise perjurious.

set up a continual exercise in finger-pointing between prosecutors and police over whose fault it was that the evidence never reached the defendant." *Jean*, 221 F.3d at 661 (Wilkinson, J., concurring in the judgment).

Wrongful convictions are tragic and regrettable, but they do occur, and because of the absolute immunity that prosecutors and witnesses alike enjoy from liability under section 1983, civil rights plaintiffs have made increasingly bold efforts to sue police officers when convictions are overturned. Surely the staggering volume of litigation that would likely be brought against law enforcement officials based upon the *Brady* theory of liability recognized by the Seventh Circuit must, at a minimum, distract those officials from their important duties, and divert scarce public resources away from crime fighting to the defense of civil litigation. Indeed, if anything, the *Briscoe* decision may have underestimated the extent of the litigation that will result if the immunity holdings below stand. The advent of DNA testing has brought with it a dramatic increase in the number of convictions that are overturned. See, *e.g.*, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547 (2002). Exonerated individuals, naturally enough, frequently seek compensation, but under state law only modest compensation, if any, is generally available. See, *e.g.*, Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days To Execution and Other Dispatches from the Wrongly Convicted* 228-32 (2000). In contrast, as the size of the judgment in this case illustrates, section 1983 offers plaintiffs seeking to recover for wrongful prosecutions and convictions the hope of enormous damages awards in their favor.

The decision of the court of appeals will accordingly stimulate an immense volume of litigation on the basis of a theory of liability about which other circuits have expressed considerable doubts, and which is in significant tension with

this Court's own decisions. Public officials exposed to this potential liability, and section 1983 plaintiffs themselves, can only benefit if this Court now provides authoritative guidance on the extent to which section 1983 permits the recovery of damages for wrongful prosecutions and convictions. Surely it is in the interests of justice for this Court to assess the theory of liability that the court of appeals has announced in this case, in order to avoid what may well prove to be years of expensive, burdensome, and ultimately wasted litigation should this Court ultimately take a different view than is reflected in the decisions below. Plenary review is amply warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 02-1920, 02-2260, 02-2356 and 02-2357.

JAMES NEWSOME,
Plaintiff-Appellee,

v.

HELEN MCCABE (as personal representative of the estate of John McCabe), RAYMOND MCNALLY, and CITY OF CHICAGO,
Defendants-Appellants.

Argued Jan. 8, 2003.
Decided Feb. 10, 2003.

Before FLAUM, *Chief Judge*, and EASTERBROOK and DIANE P. WOOD, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*.

Fifteen years after his conviction for killing Edward Cohen, James Newsome was pardoned on the ground of innocence: fingerprints and other information strongly imply that Dennis Emerson committed the crime. Newsome filed this suit under 42 U.S.C. § 1983, seeking damages from police officers who, he contends, induced three witnesses to identify him as the killer. Two years ago we held that officers McCabe and McNally are not entitled to qualified immunity if, as Newsome alleges, they not only induced witnesses to accuse him falsely but also concealed their improper activities. *Newsome v. McCabe*, 256 F.3d 747, rehearing denied, 260 F.3d 824 (7th Cir.2001). On remand the City of Chicago, which has a financial stake in the outcome as a potential indemnitor of the officers, intervened

to protect its interests. A jury found that, by concealing evidence favorable to the defense, McCabe and McNally had violated Newsome's constitutional right to due process of law and awarded him $15 million in damages, to which the district judge (after denying all post-trial motions) added some $850,000 in attorneys' fees and costs. See 2002 WL 548725, 2002 U.S. Dist. LEXIS 6345 (April 4, 2002), 2002 WL 1008472, 2002 U.S. Dist. LEXIS 8793 (May 17, 2002). In this appeal Chicago does not dispute the legal accuracy of the jury charge, does not contend that the evidence was inadequate to support the verdict, and does not argue that the financial awards are excessive. Instead it asserts official immunity, and it also contests some of the district judge's evidentiary decisions at trial.

Many of Chicago's contentions are variations (or recapitulations) of arguments that we found unconvincing the last time around. Chicago thus has preserved them for presentation to a higher court, but in this tribunal they are barred by the law of the case. Chicago's presentation effectively asks us to use a claim of immunity to resolve the case *de novo* on appeal, discarding the rule that a jury's verdict must be sustained if the evidence (and reasonable inferences), when viewed in the light most favorable to the prevailing party, would permit a reasonable juror to find in that party's favor. According to Chicago, two legal propositions call for independent appellate review: first, a claim of immunity presents a question of law for the court, see *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir.1988) (*en banc*); second, as part of the immunity inquiry, a court considers whether a constitutional violation occurred. See *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

Anthony Rounds, Josie Nash, and John Williams supplied the principal evidence at Newsome's criminal trial. Rounds and Nash, who had been in Cohen's grocery store when the murder occurred, positively identified Newsome as the killer; Williams, who had been outside, testified that he saw

Newsome flee. By the time of the civil trial more than 20 years later, Nash had died and Williams could not be found, but Rounds denounced his earlier testimony as the result of insistence by McCabe and McNally that he select No. 3 (Newsome) in a lineup; and Newsome testified that he saw the officers coach the witnesses during the lineups. The officers admitted (as Williams had testified during a suppression hearing) that they improperly displayed photos before the lineup occurred to improve the chance that Williams would pick Newsome. Chicago wants us to disbelieve the testimony Rounds gave at the civil trial, or at least give an innocent reading to his testimony that the officers threatened him with imprisonment if he told the prosecutors what actually happened at the lineup. According to the City, all McCabe and McNally meant is that Rounds faced criminal investigation unless he told the whole truth—a standard warning to witnesses who spin out inconsistent tales.

Claims of qualified immunity neither require nor authorize *de novo* appellate review of the evidence. The Supreme Court made this clear: "A court required to rule upon the qualified immunity issue must consider . . . this threshold question: *Taken in the light most favorable to the party asserting the injury,* do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151 (emphasis added). This question is for bench rather than jury, and the court of appeals does not defer to the district judge's resolution of it--but just as with motions for summary judgment under Fed.R.Civ.P. 56, or for judgment as a matter of law under Fed.R.Civ.P. 50, what the court decides is whether the record could support a finding of unconstitutional conduct. See *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). To say that a motion for judgment as a matter of law under Rule 50 is addressed to the court does not imply that the court resolves factual disputes; just so with claims of official immunity. *Saucier* made the existence of a constitutional tort

the initial inquiry because it's pointless to decide whether the impropriety of a public actor's conduct was clearly established at the time the conduct occurred, if the conduct was not improper at all. In other words, unless the plaintiff's complaint rests on a good legal theory, and the record presents a triable issue under that theory, the defendant is entitled to prevail expeditiously. When the legal theory is sound, however, and there is a material dispute about the strength of the evidence, then the case must be tried, and the jury's resolution is conclusive. If an interlocutory review tests only the sufficiency of the complaint, a later review may be required to test the sufficiency of the evidence, see *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996)—but, as with any other appellate review under Rules 50 or 56, the prevailing party receives the benefit of all reasonable credibility determinations and inferences.

This jury heard Rounds. It knew that he was contradicting testimony given at Newsome's criminal trial; it knew that Rounds is not the most savory character. But just as many a criminal defendant goes to prison on the testimony of former partners in crime who say that they have at last gone straight, so a jury could believe these witnesses when they decided to sing in a new key. And Rounds' testimony about the warning, taken in the light most favorable to the verdict, permitted the jury to find that McCabe and McNally not only manipulated the identifications (something that would not by itself support an award of damages, as our opinion denying rehearing in 2001 explained) but also obstructed the ability of the prosecutors and defense counsel to get at the truth in the criminal trial—which *does* support the jury's verdict.

Seeking a way around our decision that the officers are not entitled to qualified immunity, Chicago now contends that they should have received *absolute* immunity. The theory is that Newsome effectively accuses the officers of suborning perjury. Witnesses enjoy absolute immunity from civil liability on account of their testimony, see *Briscoe v. LaHue*,

460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), and that immunity also covers preparation. "It would be a hollow immunity if the aggrieved party could turn around and say, in effect: 'True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony.' Substance is exactly what *Briscoe* puts off limits." *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1245 (7th Cir.1990) (emphasis in original), reversed in part on other grounds (after an intermediate remand), 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). Now Chicago contends that testimonial immunity should be extended to non-witnesses who assisted in the testimony's preparation. We rejected that extension in *Ienco v. Chicago*, 286 F.3d 994, 1000 (7th Cir.2002), and see no reason to revisit that issue because Newsome's case does not present it. McCabe and McNally were not held liable for conspiring with the eyewitnesses to commit perjury; their liability is under the due process clause because they concealed exculpatory evidence—the details of how they induced the witnesses to finger Newsome. By the time of trial, Rounds, Nash, and Williams may have sincerely believed that Newsome was the murderer. They did not need immunity; instead they (and Newsome) needed protection from steps that took advantage of memory's frailty, and Newsome's lawyers needed (but did not receive) information vital to probe whether manipulation occurred.

Most persons have difficulty remembering or describing the features of strangers. A person who sees a criminal for only a brief time takes away a vague sense of appearance and behavior—and that sense may be focused by a sketch, photograph, showup, or lineup after the events. Sometimes the witness zeroes in on the correct person, sometimes not; there is an element of chance and an opportunity for manipulation. Once the witness decides that "X is it" the view may be unshakable. Psychological research has established that the witness's faith is equally strong whether or not

the identification is correct. We described these findings in *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7th Cir.1990): "An important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate and do not fade with time unless a person's memory has some pathological impairment. . . . The basic problem about testimony from memory is that most of our recollections are not verifiable. The only warrant for them is our certitude, and certitude is not a reliable test of certainty. . . . [T]he mere fact that we remember something with great confidence is not a powerful warrant for thinking it true." 897 F.2d at 296-97 (citations to the scholarly literature omitted). See Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* (3d ed.1997); Elizabeth F. Loftus, *Eyewitness Testimony* (1979; rev. ed.1996); Daniel L. Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* 112-37 (2001). See also *United States v. Hall*, 165 F.3d 1095, 1118-20 (7th Cir.1999) (concurring opinion). Jurors, however, tend to think that witnesses' memories are reliable (because jurors are confident of their own), and this gap between the actual error rate and the jurors' heavy reliance on eyewitness testimony sets the stage for erroneous convictions when (as in Newsome's prosecution) everything depends on uncorroborated eyewitness testimony by people who do not know the accused. This is why it is vital that evidence about how photo spreads, showups, and lineups are conducted be provided to defense counsel and the court. It is also why the constitutional violation justifying an award of damages is not the conduct of the lineups but the concealment of evidence about them. Secreting evidence is not covered by absolute immunity.

Because recollection is suggestible, it was important in this civil case to explore the question whether the testimony of Rounds, Nash, and Williams identifying Newsome at the criminal trial was attributable to deliberate manipulation or

instead to chance. For if chance errors are to blame, and the witnesses would have identified Newsome no matter how the officers prompted them during the lineups, then defendants' conduct did not cause the wrongful conviction and an award of damages would be improper. To explore this issue Newsome presented the testimony of Gary Wells, a professor of psychology who has performed experiments and written scholarly works in this field. See, e.g., Gary L. Wells & Elizabeth A. Olson, *Eyewitness Identification,* 54 Ann. Rev. Psych. 277 (2003); Gary L. Wells, *Eyewitness Identification: A System Handbook* (1988). Wells conducted an experiment to determine the likelihood that three persons who saw Emerson nonetheless would identify Newsome. He showed two panels of subjects different pictures of Emerson for 15 seconds then, after some time had passed, showed them pictures of the men in the lineup and asked them to choose the one they had seen in the initial photograph. Of 50 members on the first panel, none selected Newsome's photo; of 500 members on the second panel (which was shown a different photo of Emerson), 15 chose Newsome's photo. Performing a chi-square test, Wells calculated that the probability of all three eyewitnesses independently picking Newsome out of a lineup by chance error was substantially less than one in 1,000, implying that the officers must have manipulated their identifications.

Chicago asked the district judge to exclude Wells' testimony under Fed.R.Evid. 702, which as amended in 2000 codifies (with some variation) the holding of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The district judge concluded that Wells is an expert on the subject of identification, that his testimony was based on sufficient data, that his methods were reliable by the standards of the field, and that he applied these methods reliably to the facts of Newsome's case. Experiments of the kind that Wells performed are the norm in this branch of science and have met the standard for scholarly

publication and acceptance. There were of course potential problems. For example, Wells assumed that Emerson is the killer, so that the witnesses saw him; if anyone other than Emerson committed the murder, the test is invalid. Wells was candid about this vital assumption, which was open to probing and argument by the defendants. Wells also assumed that two-dimensional images (pictures) yield the same effects on memory as three-dimensional views (live action in the victim's grocery store; lineups in the police station; identifications in open court). This may or may not hold, but the claim of equivalence was open to exploration at trial, and it is hard to see what else Wells could have done. Even if he could have conscripted Emerson and the lineup participants for an experiment, time has so altered their appearance since the events of October 1979 that the results would have been unreliable. Chicago does not contend that there was a better way to find out whether Rounds, Nash, and Williams would have identified Newsome without the coaching. Instead it insists that Wells' testimony was irrelevant because he did not determine *how* the witnesses had been induced to believe that they saw Newsome commit the murder. Yet testimony need not prove everything in order to be useful. As we have said, the jury had to consider the possibility that unhappy chance rather than malfeasance led to the mistaken conviction. Wells provided information valuable in this endeavor. Appellate review of the district judge's decision is deferential, *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), and there was no abuse here; indeed, we would have acted precisely as did the district judge. As *Hall* explains, it may be prudent to avoid complicating criminal trials with general scientific evidence about the psychology of identification—though scientific evidence that a given person deviates from the norm (for example, is exceptionally suggestible) may be invaluable. See *United States v. Hall*, 93 F.3d 1337 (7th Cir.1996). No matter how criminal trials should be managed to keep the

jurors' minds on the main event, however, Wells' testimony was not a distraction in this civil proceeding but went to an important ingredient of the plaintiff's claim.

Chicago presents several other objections to the district judge's handling of the trial. These do not require separate discussion; all were treated thoughtfully in Judge Plunkett's post-trial opinion, and we substantially agree with his disposition of them. He did not separately discuss the City's request for monetary sanctions on account of Newsome's failure to reveal his arrest on heroin charges two weeks before the civil trial, his loss of employment as a paralegal, and thus his perjury at trial when he described himself as gainfully employed (which enabled counsel to argue that Newsome is a model citizen who rose above a disordered youth). Yet the district judge did conclude that Newsome's deceit does not require a new trial—a decision that Chicago no longer contests—and it was not necessary to discuss separately the possibility that a financial sanction might have been appropriate. It is not clear to us that Chicago adequately alerted the district judge to this possibility (the record does not contain a formal motion seeking monetary sanctions, see Fed.R.Civ.P. 37(c)(1)); but whether it did or not, there was no abuse of discretion in the judge's resolution, even if we might have handled this issue differently.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-2326

JAMES NEWSOME,
Plaintiff-Appellee,

v.

JOHN MCCABE AND RAYMOND MCNALLY,
Defendants-Appellants.

Argued Sept. 25, 2000
Decided July 11, 2001

EASTERBROOK, *Circuit Judge*.

James Newsome spent 15 years in prison for murder. The killing and associated crimes (armed robbery and armed violence) occurred in October 1979. Newsome was arrested in November 1979 when police, who were holding him on other charges, noted his resemblance to a composite sketch of the person who in the course of a robbery shot and killed Mickey Cohen. Newsome was convicted of that crime in September 1980, see *People v. Newsome,* 110 Ill.App.3d 1043, 66 Ill.Dec. 708, 443 N.E.2d 634 (1st Dist.1982); and his efforts to obtain collateral relief were unavailing until December 1994, when a state court vacated his conviction. In 1995, after the State's Attorney declined to put Newsome on trial a second time, the Governor of Illinois concluded that Newsome is innocent and pardoned him. Newsome then filed this suit under 42 U.S.C. § 1983 against five officers of the

Chicago Police Department. He could not seek damages for wrongful arrest and detention; that claim accrued in 1979, so the statute of limitations expired in 1981. See *Gonzalez v. Entress,* 133 F.3d 551 (7th Cir.1998). But a claim based on wrongful conviction and imprisonment did not accrue until the pardon, see *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and Newsome tried to take advantage of the newly opened window for suit. Absolute immunity forecloses any action against the prosecutors and judges, but Newsome has tried to avoid that doctrine by suing the investigating officers, arguing that the police were complicit in a wrongful prosecution. He calls this a claim of "malicious prosecution" and contends that the police must pay for failing to halt the criminal prosecution. The defendants responded by arguing that Newsome's theory is legally deficient and that, at all events, qualified immunity prevents an award of damages.

The district judge granted summary judgment in favor of James W. Eckner, Bruce James, and David Dioguardi, ruling that the evidence of record could not be read to imply that they did anything wrong. 2000 WL 528475, 2000 U.S. Dist. LEXIS 5678 (N.D.Ill. Apr. 25, 2000), reconsideration denied, 2000 WL 656680, 2000 U.S. Dist. LEXIS 6929 (May 16, 2000). But the court thought that the evidence would allow a jury to find that the other two defendants, John McCabe and Raymond McNally, failed to alert the prosecutors that Newsome's fingerprints did not match those they had obtained at the scene of the crime. Moreover, a jury could find that McCabe and McNally encouraged two witnesses to select Newsome from a lineup—which the witnesses did, forming a vital link in the process that led to Newsome's conviction as Cohen's killer—yet withheld from the prosecutors information about their coaching of the witnesses and the fact that these witnesses earlier selected pictures from a book of mug shots that did not contain Newsome's photo. The judge concluded that these events could support damages

for malicious prosecution, which the judge viewed as a constitutional tort when:

> (1) the requirements of a state law cause of action for malicious prosecution are satisfied; (2) a state actor committed the malicious prosecution; and (3) plaintiff was deprived of liberty.

2000 WL 528475 at 10, 2000 U.S. Dist. LEXIS 5678 at *31-32. The judge thought that all three of these ingredients have been satisfied because, taking the facts in the light most favorable to Newsome and disregarding all testimony derived from the tainted identifications, there was not even probable cause to prosecute him for Cohen's murder. *Id.* at 11. Because the evidence could support an inference that McCabe and McNally suborned perjury by the two eyewitnesses, the judge concluded in his order denying reconsideration that they are not entitled to qualified immunity, for both the right to be free of malicious prosecution and the rule against suborning perjury have been around a very long time.

McCabe and McNally have filed this interlocutory appeal to argue for immunity, as they are entitled to do, see *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), but the first question on the table is whether Newsome has made out a violation of constitutional rights—for we cannot call a constitutional right "clearly established" when the defendants acted (here in 1979 and 1980) if it has never been established at all. *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Defendants make a strong pitch regarding point (1) of the district court's list. They insist that Newsome has not made out "the requirements of a state law cause of action for malicious prosecution" because neither McCabe nor McNally prosecuted Newsome or was a party to the case. The People of the State of Illinois (through the State's Attorney), not police officers, brought the criminal prosecution. This con-

tention has led to a complex debate about the extent to which, under Illinois law, a complaining witness can be deemed a party for purposes of the tort of malicious prosecution. Our opinion in *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 921-26 (7th Cir.2001), explores some of these subtleties. But the answer doesn't matter unless there is a constitutional tort called "malicious prosecution," a subject not fully resolved in *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). and this constitutional tort applies to state actors the same rules state courts apply to private actors, thus using the Constitution to enforce state law. Recall the district judge's formulation: the plaintiff must show all requirements of a tort claim under state law, *plus* a deprivation of liberty, *plus* the defendant's status as a state actor (this last ingredient found in *§ 1983* itself). Whatever scope malicious prosecution may have as a constitutional tort after *Albright*, it does not depend on state law in this way. To the contrary, the existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution.

Whether there is a constitutional right not to be prosecuted without probable cause—the question that the district court saw through the lens of malicious prosecution—was addressed and answered in the negative by seven Justices in *Albright*. The problem is that they did not agree on the reason. Four Justices concluded that probable cause is the exclusive domain of the fourth amendment, and that unless the plaintiff can establish that his arrest was unlawful there is no further constitutional claim. 510 U.S. at 268-75, 114 S.Ct. 807 (Rehnquist, C.J., joined by O'Connor, Scalia & Ginsburg, JJ.). See also *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (if probable cause exists at the time of arrest, then the police cannot be held liable for ensuing custody, even if mistaken). Newsome had a potential fourth amendment claim, but as we mentioned at the outset the time to pursue it expired almost 20 years ago. One Justice preferred to analyze the subject in terms of substantive due

process, an approach that could leave room for Newsome's claim but doomed *Albright's* because he did not argue that the police engaged in egregious misconduct. 510 U.S. at 286-91, 114 S.Ct. 807 (Souter, J.). Two more Justices believed that the right approach lies in due *process* without substantive coloration—whether the person seized by the state had an adequate opportunity to defend himself in the criminal prosecution and, if not, an adequate opportunity to obtain compensation in state court. 510 U.S. at 281-86, 114 S.Ct. 807 (Kennedy, J., joined by Thomas, J.). A jury might conclude that McCabe and McNally deprived Newsome of an adequate chance to defend himself in the criminal prosecution. But Justices Kennedy and Thomas concluded that in such circumstances the federal Constitution still does not supply a damages remedy, unless the state courts refuse to do so. Their approach relies on *Parratt v. Taylor,* 451 U.S. 527, 535-44, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), which holds that the opportunity to sue in state courts usually supplies all the process that is due to redress unauthorized activities of state employees. Justices Kennedy and Thomas concluded that remedies available to *Albright* under state law for wrongful prosecution provided him with due process of law. States differ in their willingness to provide such remedies—but the state in question in *Albright* was Illinois, and remedies available to Albright are (or were) available to Newsome too. What this means is that satisfying the elements of the state-law tort of malicious prosecution, far from being the foundation of a constitutional tort as the district judge believed, *knocks out* any constitutional tort of malicious prosecution, because, when a state-law remedy exists, Justices Kennedy and Thomas conclude that due process of law is afforded by the opportunity to pursue a claim in state court, and four other Justices do not think that the due process clause applies in the first place.

The district judge is hardly to be faulted for using a tripartite formula for a constitutional tort of malicious prose-

cution. This court has articulated it at least four times since *Albright*. See *Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999); *Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998); *Washington v. Summerville*, 127 F.3d 552, 558-59 (7th Cir.1997); *Reed v. Chicago*, 77 F.3d 1049, 1051 (7th Cir.1996). But in none of these cases did anything turn on the precise formulation, and none of our opinions dealt with reconciling this formulation with the position that Justices Kennedy and Thomas took in *Albright*, which, as the narrowest ground of decision, constitutes the effective holding of the Court. See *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The formula appears to be dictum developed from pre-*Albright* opinions, unexamined in our more recent decisions because the parties to *Cervantes, Sneed, Washington,* and *Reed* did not seek to have this court reexamine the issue in the light of intervening developments. In other recent decisions we have recognized that *Albright* scotches any constitutional tort of malicious prosecution when state courts are open. See, e.g., *Mays v. East St. Louis*, 123 F.3d 999, 1002-03 (7th Cir.1997); *Spiegel v. Rabinovitz*, 121 F.3d 251, 254-57 (7th Cir.1997); *Smart v. Board of Trustees,* 34 F.3d 432, 434-35 (7th Cir.1994) (suggesting the possibility of a claim based on the first amendment if the prosecution is used to punish speech). See also *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 901 (7th Cir.2001); *Williams v. Heavener*, 217 F.3d 529, 531-32 (7th Cir.2000). These opinions do not address the tripartite formula of *Cervantes, Sneed, Washington*, and *Reed*. Having given the matter some thought, we now withdraw the dicta in those four opinions. Claims of malicious prosecution should be analyzed not under the substantive due process approach implied by this formula but under the language of the Constitution itself and, if state law withholds a remedy, under the approach of *Parratt* adopted by Justices Kennedy and Thomas in *Albright*. Relabeling a fourth amendment claim as "malicious prosecution" would

not extend the statute of limitations (*Reed* so holds), and if a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory "malicious prosecution."

Where does this leave Newsome? Certainly not with a constitutional claim founded on malicious prosecution. Nor does he have a viable fourth amendment claim, for the statute of limitations expired long ago. But he does have a due process claim in the original sense of that phrase-he did not receive a fair trial if the prosecutors withheld material exculpatory details. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Although the State's Attorney did not have in his file details about the fingerprints and the means McCabe and McNally used to influence the identification, a prosecutor is responsible for learning of and disclosing all exculpatory evidence known to the police. See *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Defendants recognize that a claim along these lines states a genuine constitutional tort. See *Jones v. Chicago*, 856 F.2d 985 (7th Cir.1988); *Jean v. Collins*, 221 F.3d 656 (4th Cir.2000) (en banc) (all 12 judges concluded that police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with *Brady*, violate the due process clause). Such a violation occurred at trial (for *Brady* identifies a trial right) and therefore the due process claim's accrual was postponed by *Heck* until the pardon. Nonetheless, defendants contend, if the claim is recast in this fashion then they prevail because *they* did not withhold evidence; the prosecutor did so (even if they were to blame). Because injury depended on the action of the prosecutor they either are not substantively liable or possess a derivative form of immunity, the line of argument concludes.

Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir.1994), provides the principal support for this contention. It holds that responsibility rests on the prosecutor, rather than the

police, when there would have been no injury but for a prosecutorial decision that is protected by absolute immunity. *Buckley* finds company in *Michaels v. McGrath*, 222 F.3d 118 (3d Cir.2000), but two circuits have reached contrary conclusions. See *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir.2000); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir.1997). One Justice has expressed the view that *Buckley* was decided incorrectly. See *Michaels v. McGrath*, 531 U.S. 1118, 121 S.Ct. 873, 148 L.Ed.2d 780 (2001) (Thomas, J., dissenting from the denial of certiorari). But Newsome's suit does not present the *Buckley* issue, and defendants' reliance on that decision is unavailing, for a fundamental reason: *Buckley* supposed that the police had been forthcoming with the prosecutors, so that injury really could be traced to prosecutorial decisions. We distinguished what occurred in *Jones*, where the police had fabricated some evidence and concealed much exculpatory information. If officers are not candid with prosecutors, then the prosecutors' decisions—although vital to the causal chain in a but-for sense—are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their performance with or without legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution.

Putting *Buckley* and all problems of establishing causation to one side, we make the normal immunity inquiry: was it clearly established in 1979 and 1980 that police could not withhold from prosecutors exculpatory information about fingerprints and the conduct of a lineup? See *Wilson*, 526 U.S. at 614-18, 119 S.Ct. 1692; *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Saucier v. Katz*, --- U.S. ----, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The answer is yes: The *Brady* principle was

announced in 1963, and we applied it in *Jones* to affirm a hefty award of damages against officers who withheld exculpatory information in 1981. This is not to say that McCabe or McNally did anything wrong; like the district judge we have taken the evidence and all reasonable inferences in Newsome's favor, as the summary-judgment standard requires. No one would quarrel with the assertion in defendants' reply brief that "in 1979 [and today], the detectives could have reasonably believed that it should be up to the prosecutors, and ultimately the court, to determine if an eyewitness identification is sufficiently reliable for use at trial." Newsome has made a more serious claim that the defendants withheld information important to that prosecutorial (and judicial) decision, and on this interlocutory appeal we cannot resolve disputes about the record. See *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). If Newsome can prove what he alleges, then under the approach of *Brady* and *Jones v. Chicago* he will establish a violation of the due process clause, a kind of violation for which officers McCabe and McNally do not have immunity. This is not the basis of the district court's order, nor is it Newsome's preferred theory--malicious prosecution is not tenable as an independent constitutional theory--but we may affirm a decision on any ground that the record supports. The decision of the district court rejecting defendants' affirmative defense of qualified immunity is accordingly

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-2326

JAMES NEWSOME,
Plaintiff-Appellee,
v.
JOHN MCCABE and RAYMOND MCNALLY,
Defendants-Appellants.

Aug. 14, 2001.

Before FLAUM, *Chief Judge*, and EASTERBROOK and DIANE P. WOOD, *Circuit Judges*.

On Petition for Rehearing

PER CURIAM.

Defendants' petition for rehearing contends that it was not clearly established, when they acted, that the state's constitutional duty to avoid concealing materially exculpatory evidence ever imposed any obligations on police, as opposed to prosecutors. That proposition is incompatible with *Jones v. Chicago*, 856 F.2d 985 (7th Cir.1988), which dealt with police conduct at about the same time as Newsome's trial, and with *Jean v. Collins*, 221 F.3d 656 (4th Cir.2000) (en banc), which holds that police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with the obligations articulated in *Brady*, violate the due process clause.

We agree with defendants that police need not spontaneously reveal to prosecutors every tidbit that with the

benefit of hindsight (and the context of other evidence) could be said to assist defendants. That is one reason why duties often depend on a defendant's request. Just as prosecutors need not automatically open their files to defendants, so police need not automatically engage in debriefing sessions with prosecutors. This was why our opinion went out of its way to agree with the defendants' contention that "in 1979 [and today], the detectives could have reasonably believed that it should be up to the prosecutors, and ultimately the court, to determine if an eyewitness identification is sufficiently reliable for use at trial." If all the plaintiff can prove at trial is that these officers failed to take the initiative in providing the prosecutors with information that would have come out as soon as the prosecutors asked (or as soon as defense counsel interviewed the police or questioned them on the stand), then no due process violation by the police has been established. But if the right characterization of the defendants' conduct is that they deliberately withheld information, seeking to misdirect or mislead the prosecutors and the defense, then there is a genuine constitutional problem.

Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), requires us to assume that plaintiff can prove a deliberate withholding of information. Such proof would demonstrate that defendants violated clearly established rights—for the due process clause imposes obligations on all state actors, and not just on prosecutors. Different state actors play different roles in the prosecutorial process, but as *Jones* and *Jean* show it is possible for police no less than prosecutors to violate the due process clause by withholding exculpatory information. Whether the police did this here is a disputed question of fact that precludes summary judgment. It may be necessary, as *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151, 2158, 150 L.Ed.2d 272 (2001), holds, to take another look at the immunity question once the facts are known, for until then it may be impossible to determine

whether the legal rule was sufficiently clear in relation to the facts. While the facts remain in doubt, however, it is premature to attempt this analysis.

The petition for rehearing is denied. No judge in regular active service has requested a vote on the petition for rehearing en banc, which therefore also is denied.

APPENDIX D

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 96 C 7680

JAMES NEWSOME

Petitioner,

v.

BRUCE JAMES, JAMES W. ECKNER, DAVID DIOGUARDI, JAMES MCCABE, RAYMOND MCNALLY, THEATRICE PATTERSON, AND OLIVIA RUSSELL

Defendants.

April 26, 2000

MEMORANDUM OPINION AND ORDER

PLUNKETT, *Senior J.*

In his first amended complaint, James Newsome asserts two claims pursuant to 42 U.S.C. § 1983 ("section 1983"). In Count I, which is asserted against James W. Eckner, David Dioguardi, James McCabe and Raymond McNally, plaintiff alleges that defendants violated his Fourth Amendment rights by maliciously prosecuting him. In Count II, which is asserted against all of those defendants and Bruce James as well, plaintiff alleges that defendants conspired to violate his Fourth Amendment rights.[1] Plaintiff has filed a Federal Rule of Civil Procedure 56 motion for summary judgment solely on Count I. Defendants have moved for summary judgment

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[1] The claims against defendants Theatrice Patterson and Olivia Russell were dismissed at the end of 1999. (*See* 12/27/99 Minute Order.)

on both counts.[2] In addition, each party has filed motions to strike certain factual submissions of the other. For the reasons set forth below, (1) plaintiff's motion for summary judgment is denied; (2) defendants Eckner, Dioguardi and James' motions for summary judgment are granted; (3) defendants McNally and McCabe's motions for summary judgment are denied; (4) defendants' motion to strike paragraphs from plaintiff's Rule 12(M) Statement is granted in part and denied in part; (5) defendants' motion to strike the July 29, 1999 affidavit of Anthony Rounds is denied; (6) plaintiff's motion to strike the affidavit of Stephen Meagher is granted; and (7) plaintiff's motion to strike the affidavit of Donald Lantz is granted in part and denied in part.

The Motions to Strike

Before we can reach the merits of the summary judgment motions, we must address the motions to strike. Defendants have filed a motion to strike the July 29, 1999 affidavit of Anthony Rounds and a motion to strike various paragraphs of Plaintiff's Local General Rule ("Rule") 12(M) Statement.[3] Plaintiff has filed a motion to strike the affidavits of Stephen B. Meagher and Donald Lantz. We will start with defendants' motions.

Defendants' Motion to Strike the July 29, 1999 Affidavit of Anthony Rounds

Anthony Rounds was a witness to the murder of Mickey Cohen, the crime for which plaintiff was wrongfully convicted. Defendants contend that Rounds' July 29, 1999

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[2] For reasons that are unclear, the parties filed and briefed their motions separately rather than as cross-motions, a procedure that needlessly multiplies the work of the parties and the Court.

[3] Effective September 1, 1999, Local General Rule 12 was renumbered LR 56.1. Though all of the briefing took place after that date, the parties submitted some Rule 12 Statements and some LR 56.1 Statements. For clarity, we will refer to the various facts statements as the parties do.

affidavit must be stricken because it tells a tale quite different from the sworn testimony he previously gave at the hearing on plaintiff's motion to suppress line-up identifications, at plaintiff's criminal trial and in a 1998 deposition in this case. At plaintiff's criminal trial, Rounds testified that: he saw plaintiff, who was dressed entirely in black, in the produce section of Cohen's grocery store immediately before the murder; he saw the handle of a gun protruding from plaintiff's shirt; shortly thereafter he left the store and heard two shots fired; after hearing the shots he ran back inside the store, collided face-to-face with plaintiff and watched him run down the street; and he subsequently identified plaintiff from a line-up. (Mot. Strike Rounds' 7/29/99 Aff., Ex. B at 917-22, 926-28.) At the suppression hearing, Rounds testified that the police said only one thing to him during the line-up: "Take [your] time, let all of the suspects step forward, and then at the end after [you have seen] the suspects, let . . . [the officer] know." He also testified that the line-up participants did not speak. (*Id.*, Ex. A at 47, 52.) In the 1998 deposition in this case, Rounds testified, albeit in response to leading questions, that his testimony in the criminal trial was truthful, and that the police officers had not told him what to say or whom to pick out of the line-up. (*Id.*, Ex. C at 22-24.)

Rounds' July 29, 1999 affidavit stands in sharp contrast to his prior testimony. In it Rounds states that: he "testified falsely" during plaintiff's criminal trial, he had not seen plaintiff dressed in black in Cohen's store, he did not see the murderer's gun nor did he bump into the murderer as he fled the store. (*Id.*, Ex. D ¶¶ 1-2.) Rather, Rounds claims that he was in the store when the shots were fired, immediately dropped to the floor when he heard them, and saw nothing more than a "shadowy profile" of the murderer as he fled. (*Id.* ¶ 7.) Rounds says he told the police that he did not get a good look at the murderer, but was asked to view a line-up nonetheless. (*Id.* ¶ 11.) At the line-up, Rounds now claims, he could not make an identification of either a face or a voice,

and repeatedly told that to the police who "constantly" told him that "number 3 [plaintiff] looked and sounded like the gunman." (*Id.* ¶¶ 12-14.) The testimony he gave at plaintiff's trial, Rounds asserts, "was the creation of the plain clothes police officers" and "was based on what the police told [him] they knew, and not based on what [he] recalled." (*Id.* ¶¶ 3, 18.)

Rounds' 2000 deposition did not help clarify the situation. When he was asked whether he had testified truthfully at plaintiff's criminal trial, Rounds said, variously, that he could not remember the trial, he could not remember whether his testimony was truthful, and that he "believe[d]" he had told the truth. (*Id.*, Ex. E at 16-20, 29-30.) Rounds also could not remember his 1998 deposition testimony, though he said he would have answered the deposition questions truthfully. (*Id.* 25-28.) The only thing Rounds recalled with certainty during his 2000 deposition were the events surrounding Cohen's murder, which he claimed transpired the way they are described in his July 29, 1999 affidavit. (*Id.* 31-33, 53.)

It is well-settled that parties cannot create sham issues of fact with affidavits that contradict prior sworn statements. *Russell v. Acme-Evans Corp.*, 51 F.3d 64, 67-68 (7th Cir.1995). Our court of appeals has extended that principle to certain non-party witnesses, but not, as far as we can tell, to *disinterested* witnesses. *See Adelman-Tremblay v. Jewel Cos., Inc.*, 859 F.2d 517, 521 (7th Cir.1988) ("We can think of no reason, however, not to apply [the sham affidavit] rule to the present case involving the testimony and affidavit of the plaintiff's sole expert witness."); *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1169-72 (7th Cir.1996) (applying rule to strike affidavits of mother and step-father of plaintiff). Nor do we believe that it would. The concern that underlies the sham affidavit rule—that parties or witnesses aligned with them can defeat summary judgment on meritless claims by recanting prior sworn statements—is

absent in the case of disinterested witnesses. Variations in the testimony of disinterested witnesses, as our court of appeals has noted, raise questions about credibility that must be answered by a jury, not by the Court. *Bank of Illinois,* 75 F.3d at 1170. Defendants do not suggest that Rounds is anything but a disinterested witness. Consequently, we will not strike his July 29, 1999 affidavit under the sham affidavit rule.

Defendants' Motion to Strike Various Paragraphs of Plaintiff's Rule 12(M) Statement

Defendants also move to strike 27 [4] of the 57 paragraphs of plaintiff's Rule 12(M) Statement. Defendants cite no authority for their motion to strike, but we assume it is brought pursuant to LR 56.1, which requires that the fact statements submitted in support of or opposition to summary judgment motions be supported by "specific references to the affidavits, parts of the record, and other . . . materials." Though permissible, a motion to strike fact statements is, as plaintiff notes, "redundant and unnecessary." (Pl.'s Resp. Defs.' Mot. Strike Pl.'s Stmt. Facts at 1.) Defendants could have achieved the same result, exclusion of unsupported fact statements from consideration on plaintiff's motion, simply by noting in their response to plaintiff's statement that various asserted facts were not supported by the record. Having presented the motion, we will decide it, but we discourage the parties from filing similar motions in the future.

Defendants contend that paragraph 10, which states "James Newsome did not murder Mickey Cohen" must be stricken because it is not supported by the cited evidence. We disagree. Governor Edgar's pardon of plaintiff, which he cites

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[4] Defendants indicate in the opening portion of their brief that they seek to strike a total of 28 paragraphs: Nos. 10-15, 19-22, 26-28, 32-34, 36, 38-40, 42-43, 45-47, 50, 54 and 57. In the body of the brief, however, they make no argument regarding paragraph 28. Thus, we have not considered it on this motion.

to support that paragraph, states in relevant part "Grant Pardon On Grounds Of Innocence With An Order Permitting An Expungement . . . ." (Pl.'s Rule 12(M) Stmt., Ex. D.) The pardon supports plaintiff's assertion that he did not murder Mickey Cohen.

Defendants make the same argument with respect to paragraphs 11 and 12, which state, respectively: "Dennis Emerson, an African-American man who had a long history of armed robbery, murdered Mickey Cohen" and "In the course of the subject armed robbery, Emerson left his fingerprints on several grocery store items that he touched with his bare hands while at the scene." Again, we disagree. Emerson's criminal record demonstrates a history of armed robbery, and it is reasonable to infer from the fingerprint report, which shows that Emerson's prints were found at the scene of the murder on items the killer touched with his bare hands, that Emerson robbed and killed Cohen. Paragraphs 11 and 12 will stand.

Defendants move to strike paragraphs 13, 38, 39, 40 and 42 because they are supported solely by Rounds' July 29, 1999 affidavit. Because we did not strike that affidavit, we have no reason to strike the fact statements that are supported by it.

Defendants also contend that the fact statements in paragraphs 14 and 15 and 19-22 are not supported by the evidence cited. The only two facts in paragraph 14 that are supported by the cited evidence is that plaintiff and White are African-American men who were arrested by defendant James on Chicago's north side. (*See* Pl.'s Rule 12(M) Stmt., Ex. H.) Everything else in that paragraph is stricken. The second sentence of paragraph 15 is not supported by the cited evidence. It is also stricken. The references in paragraph 19 to James and Eckner and the location of White's residence are not supported by the cited evidence and are, therefore, stricken. The specific references to James, Eckner and Dioguardi in paragraph 20, and to Eckner in paragraph 21, are

also stricken because they are not supported by the cited evidence. The assertions in paragraph 22, however, are directly supported by or can be reasonably inferred from the cited evidence. Paragraph 22 will stand.

In Paragraph 26, plaintiff asserts that defendants knew on November 1, 1979 that plaintiff's fingerprints did not match those at the crime scene. The April 23, 1985 fingerprint report cited for this fact indicates that the fingerprint comparison was done on November 1, 1979, but does not indicate when any of the defendants became aware of it. (*Id.*, Ex. O, Latent Fingerprint Examination Report.) It is, however, reasonable to infer from this report and the October 30, 1979 police report prepared by defendants McCabe and McNally, which states that various items at the murder scene "were processed for possible ridge impressions" (*id.*, Ex. C, 10/30/79 Police Report), that the results of the fingerprint comparison were reported to McCabe and McNally, the detectives assigned to the investigation, on November 1, 1979 when it was done. To the extent paragraph 26 imputes knowledge of the comparison to any of the other defendants, it is stricken.

The cite for paragraph 27 establishes that Dennis Emerson's photo should have been in the mug books reviewed by Josie Nash and Anthony Rounds, not that it *was* in those books, as plaintiff asserts. Accordingly, paragraph 27 is stricken.

In paragraphs 32 and 33, plaintiff asserts that the defendants violated Chicago Police Department line-up procedures. Because the cites for those paragraphs do not support that proposition, those paragraphs are stricken.

The evidence cited for paragraph 34 adequately supports the proposition that John Williams gave a description of the killer to Josie Nash and Anthony Rounds while they waited to view the line-up. That portion of the paragraph will stand. In all other respects it is stricken.

The line-up photo establishes that plaintiff was holding a cigarette, but not that the police asked him to hold it or that plaintiff is a non-smoker, as plaintiff asserts. Paragraph 36 is stricken.

Defendants' quarrel with paragraph 43 is, apparently, relevance. The paragraph states that Dennis Emerson was arrested in early 1980 for unlawful use of a weapon, and that the police learned while he was in custody on that charge that Emerson was wanted for a 1979 robbery/murder that occurred less than two miles from the Cohen murder. Though the arrest report that supports this paragraph does not *establish* that the defendants knew Emerson was wanted for a 1979 robbery/ murder that occurred near the Cohen murder scene, it is certainly relevant to that issue and will not be stricken.

Defendants seek to strike paragraphs 45 and 46 because they are not supported by the cited evidence. That is not true of paragraph 45, which is directly supported by Emerson's deposition testimony. It is true of paragraph 46, however, which asserts that Emerson filed a motion for a speedy trial on the Cohen murder charge, a fact not found either in the motion or in Emerson's deposition testimony. Paragraph 46 is stricken.

Paragraph 47, which makes a number of allegations about the police department's destruction of Emerson's gun, is unsupported by the record and is stricken.

The citation for paragraph 50 supports the proposition that McNally and McCabe examined plaintiff's residence and found no evidence that linked him to the Cohen murder. It is, in all other respects, stricken.

In paragraph 54, plaintiff relies on a document that bears no indication that it was ever filed, for the proposition that plaintiff filed a Motion for Discharge alleging fraud by the police. Paragraph 54 is stricken.

Paragraph 57, which is adequately supported by McNally's answer to the first amended complaint, will stand.

Finally, defendants ask that Exhibits U and AA to plaintiff's 12(M) Statement, Dennis Emerson's motion for a speedy trial and plaintiff's motion for discharge, respectively, be stricken because these purported court papers are not signed or dated, and bear no indication of ever having been filed. The only materials that can be considered on a summary judgment motion are those of "evidentiary quality." *Winskunas v. Birnbaum,* 23 F.3d 1264, 1267 (7th Cir.1994). These unauthenticated, hearsay statements do not meet that standard. They are, therefore, stricken.

Plaintiff's Motion to Strike the Affidavit of Stephen Meagher

In support of their motion for summary judgment defendants have submitted the affidavit of Stephen Meagher, a Supervisory Fingerprint Specialist employed by the Federal Bureau of Investigation ("FBI"). Plaintiff claims that Meagher's affidavit must be stricken because it: (1) constitutes undisclosed expert testimony; and (2) is irrelevant to the issues in this case.

In his affidavit, Meagher, who has worked in the FBI's Identification Division continuously since 1972, states that the manual fingerprint classification system used by the FBI in 1979 virtually precluded the FBI from comparing unidentified latent fingerprints submitted to it by a local law enforcement agency to the FBI's fingerprint records. (Meagher Aff. ¶¶ 2-4.) Moreover, Meagher says, even when the FBI's fingerprint system was automated in 1983, "there was no guarantee that use of the FBI's [automated] system would produce . . . the identity of the suspect who left the latent print."(*Id.* ¶¶ 5-6.) Finally, Meagher says that the fingerprints of Dennis Emerson, the probable killer of Mickey Cohen, were not added to the FBI's system until September 1,

1984, and thus, could not have been identified by the FBI prior to that date. (*Id.* ¶ 7.)

Though we agree with defendants that Meagher's affidavit constitutes lay, not expert, testimony, we also agree with plaintiff that it is irrelevant to this case. Defendants offer Meagher's affidavit to refute the following fact in Plaintiff's Rule 12(M) Statement: "The Defendants did not send the killer's fingerprints to Washington, D.C. so they could be run through the FBI's fingerprint database or compare the prints to any known violent offenders' on file with the CPD because they already had [plaintiff] ." (*See* Defs.' Resp. Pl.'s Rule 12(M) Stmt. ¶ 49.) Defendants contend that the affidavit is relevant because it shows that it would have been impossible for the FBI to match the Cohen murder scene prints to Dennis Emerson's prints in 1979. But plaintiff offers the statement, which is supported by defendant McNally's deposition testimony, as evidence that defendants made a deliberate choice not to pursue identification of the fingerprints found at the Cohen murder scene. Meagher's affidavit would be relevant to that issue only if there were evidence that the defendants *knew* it would be futile to send the fingerprints to the FBI. There is not. Accordingly, Meagher's affidavit is stricken and defendants are deemed to have admitted paragraph 49 of plaintiff's Rule 12(M) Statement.

Plaintiff's Motion to Strike the Affidavit of Donald Lantz

Plaintiff also seeks to strike paragraphs 4-6 of Donald Lantz's affidavit because they are based on inadmissible hearsay. In those paragraphs Lantz, a private investigator who was hired by plaintiff, recounts conversations he had with Josie Nash and Anthony Rounds in July 1988. In essence, Lantz says that both Nash and Rounds denied that anyone coerced them into identifying plaintiff as Cohen's murderer or induced them to testify falsely about their identifications. These statements fall squarely within the definition of hearsay. *See* Fed.R.Evid. 801.

Even so, defendants contend, they are admissible because they fall within the residual exception to the hearsay rule found in Federal Rule of Evidence 807. That rule permits the admission of hearsay statements "not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness" if they are: (1) offered as evidence of a material fact; (2) more probative on the point for which they are offered than any other evidence that the proponent can procure through reasonable efforts; and (3) the general purposes of the Rules of Evidence and the interests of justice will be served by admission of the statements.

The statements of Josie Nash meet these criteria. The fact that these statements are offered by an investigator who was paid by plaintiff, who plainly would have preferred that Nash admit to coercion, provides a circumstantial guarantee of trustworthiness. Nash's statements are offered as evidence that the defendants did not coerce her line-up identification, a fact unquestionably material to this litigation. Further, these statements are more probative on this point than any other evidence that the defendants can procure because Nash is dead. Finally, admission of these statements will serve the purposes of the Rules of Evidence and the interests of justice by allowing "Nash" to rebut Rounds' account of the defendants' behavior at the line-up. *See* Fed.R.Evid. 102 (noting that the purpose of the rules is to ascertain the truth and justly determine proceedings).

The statements Lantz attributes to Rounds, however, do not qualify for admission under the residual exception. Unlike Nash, Rounds is very much alive and apparently available to testify in his own words. Though defendants contend that it is "virtually impossible" to secure "reliable, uninfluenced testimony" from Rounds (Defs.' Resp. Mots. Strike at 6), they cite no evidence to support that statement, and it is not a conclusion we can draw from this record. Plainly, Rounds, who admits to certain memory lapses, has changed his story

about the events surrounding Mickey Cohen's murder. But that does not necessarily mean that he is unduly susceptible to influence. If defendants believe that Rounds is not competent to testify, they can and should bring that issue to the Court's attention. But defendants stop short of challenging his competency. Instead, they ask us to find that Rounds' criminal trial testimony, his 1998 deposition testimony and his statements to Lantz—in other words, the statements that favor them—are reliable and admissible, and that his July 29, 1999 affidavit and his 2000 deposition testimony—the statements that do not favor them—are unreliable and inadmissible. That we cannot do. Because the statements Rounds allegedly made to Lantz about the line-up are not more probative on that issue than is Rounds' own testimony, they are not admissible under the residual hearsay exception.

Even if Rounds' statements to Lantz are not admissible for the truth of the matter asserted, i.e., that his line-up identification was not coerced, defendants argue that they are admissible to rebut plaintiff's argument that Rounds gave only two uncoerced statements: his July 29, 1999 affidavit and his 2000 deposition testimony. We agree with defendants that Rounds' statements to Lantz would be admissible for the limited purpose of showing the existence of another uncoerced statement, if that issue were relevant to the summary judgment motions. It is not. Plaintiff's argument that only Rounds' most recent statements were given freely is nothing more than a plea to credit them and disregard the rest. Arguments about the relative worth of Rounds' various statements should be made to a jury at trial, not to the Court at summary judgment. Because the weight of Rounds' testimony is not an issue we will decide on these motions, plaintiff's motion to strike the portion of Lantz's affidavit that recounts his conversations with Rounds is granted.

Motions for Summary Judgment

Before we reach the substance of the motions, we must address the parties' misunderstanding of the mechanics of LR 56.1. The procedure, as set forth in that rule, is as follows: (1) the moving party must submit a statement of assertedly undisputed facts that entitle it to summary judgment (LR 56.1(a)(3)); (2) the party opposing the motion must submit a statement that responds to each of the moving party's facts (LR 56.1(b)(3)(A)) and, if it wishes, a statement of any additional undisputed facts that the opposing party believes require the denial of summary judgment (LR 56.1(b)(3)(B)); (3) if the party opposing the motion submits a statement of additional facts, then the moving party must submit a reply to those additional fact statements (LR 56.1(a)(3)). No other responses or replies are required or will be considered.

With respect to defendants' motion, defendants submitted a LR 56.1(a)(3) statement of undisputed facts, plaintiff submitted a LR 56.1(b)(3)(A) response and a LR 56.1(b)(3)(B) statement of additional facts, and defendants submitted a LR 56.1(a)(3) reply to the additional facts. In addition, however, defendants submitted a document in which they "reply" to plaintiff's responses to their statement of undisputed facts (his LR 56.1(b)(3)(A) statement). (*See* Consolidation Defs.' 56.1(a)(3) Statement Undisputed Material Facts Supp. Mot. Summ. J., Pl.'s 56.1(b) Resp. & Defs.' 56.1(a)(3) Reply.) This additional "reply" is not authorized by LR 56.1 and will not be considered by the Court.

Similarly, with respect to plaintiff's motion, plaintiff submitted a statement of undisputed facts and defendants submitted a response, but they did not submit a statement of additional facts that they believe require denial of the motion. Nonetheless, plaintiff filed a "Reply Statement of Facts." Because defendants did not submit additional facts, plaintiff was not entitled to reply. Therefore, we will disregard plaintiff's reply statement of facts.

Facts

At about 1:30 p.m., on the afternoon of October 30, 1979, John Williams bumped into a man dressed entirely in black who was talking to two women on Loomis Street in Chicago, in the vicinity of Mickey Cohen's grocery store. (Pl.'s LR 56.1(b) Resp. ¶ 29; Defs.' LR 56.1(a)(3) Stmt., Ex. J, 9/22/80 Crim. Tr. at 531-33.) At about 1:45 p.m., a man dressed entirely in black walked into Mickey Cohen's store, placed a few food items on the counter, and pulled a gun on Cohen. (Pl.'s LR 56.1(b) Resp. ¶¶ 26, 31-33, 40.) Cohen, who had a weapon in his pocket, exchanged fire with the shooter. (*Id.* ¶¶ 42-44.) Cohen was shot and died of his wounds. (*Id.* ¶ 26.)

Josie Nash, an employee of Cohen's, was in the store at the time of the shooting. (*Id.* ¶¶ 30, 46.) Plaintiff contends that Anthony Rounds was also in the store at the time of the shooting, though he did not get a good look at the shooter. (Pl.'s LR 56.1(b) Stmt. Add'l Facts ¶ 4; *id.,* Ex. D, 7/29/99 Rounds Aff.,¶ ¶ 5-10.) Defendants claim that Rounds left the store just before the shooting began and came back in as the shooter was fleeing. (Defs.' LR 56.1(a)(3) Stmt. ¶¶ 38-39, 47-51.)

Sometime after 2:00 p.m. that day, Willie Smith was standing on Bishop Street, the street immediately west of Loomis, getting tools out of the trunk of his car. (Pl.'s LR 56.1(b) Resp. ¶¶ 52-53; *id.,* Ex. F, 10/31/79 Supp. Report.) A man wearing a black leather jacket and dark trousers ran by Smith, got into an early-1970s model green Ford, and left the area. (*Id.,* Ex. F, 10/31/79 Supp. Report.)

After the shooting, Nash and Rounds went to the police station to look at mug shots. (*Id.* ¶ 57.) Plaintiff contends both of them identified someone from the mug books. (Pl.'s LR 56.1(b) Resp. ¶ 59; Pl.'s Rule 12(M) Stmt., Ex. M, 6/30/80 Suppression Hr'g Tr. at 20, 22-23.) Defendants say they did not. (Defs.' LR 56.1(a)(3) Stmt. ¶ 59.) It is undisputed, in any

event, that plaintiff's photo was not in any of the mug books that Nash and Rounds reviewed. (Defs.' Resp. Pl.'s Rule 12(M) Stmt. ¶ 25.) [5]

Though he now claims that he did not see the shooter's face, Rounds consulted with a police sketch artist to prepare a composite sketch of the shooter. (Pl.'s LR 56.1(b) Resp. ¶ 61.) On October 31, 1979, police officers showed the sketch to Williams, who said the man in the sketch was the one he had bumped into on Loomis Street the previous afternoon. (Defs.' LR 56.1(a)(3) Stmt. ¶¶ 62-63.) [6] The sketch was placed in the November 1, 1979 Chicago Police Department Daily Bulletin. (*Id.*, Ex. N, 11/1/79 Daily Bulletin.)

On November 1, 1979, James Newsome and Marvin White were arrested by Chicago police officers for the armed robbery of Shirley Wills. (Pl.'s LR 56.1(b) Resp. ¶ 2.) While they were in custody, defendant Eckner showed defendant James a copy of the November 1, 1979 Daily Bulletin. (Defs.' LR 56.1(a)(3) Stmt. ¶ 65.) [7] James says he noticed a similarity between the composite and plaintiff. (Defs.' LR 56.1(a)(3) Stmt., Ex. H, James Dep. at 138-39.) Consequently, either

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[5] The suppression hearing testimony defendants cite to deny this fact actually supports it. (*See* Defs.' Resp. Pl.'s Rule 12(M) Stmt. ¶ 25.)

[6] Plaintiff's attempts to deny these facts fail. Even if true, the fact that Williams was shown a picture of plaintiff shortly before the line-up on November 1, 1979 does not discredit Williams' testimony that he was shown a composite sketch on October 31, 1979. (*Compare* Pl.'s LR 56.1(b) Resp. ¶ 62 *with* Defs.' LR 56.1(a)(3) Stmt. ¶ 62.) Similarly, the fact that Williams told a police officer on October 30, 1979 that he "saw or heard nothing" with respect to the shooting does not negate his testimony that when he was shown the composite sketch the next day he recognized the man depicted in it as the one he had bumped into on Loomis Street the previous afternoon. (*Compare* Pl.'s LR 56.1(b) Resp. ¶ 63 *with* Defs.' LR 56.1(a)(3) Stmt. ¶ 63.)

[7] Though plaintiff denies other aspects of this fact statement, he does not contest the fact that Eckner showed the bulletin to James. (*See* Pl.'s LR 56.1(b) Resp. ¶ 65.)

James or his partner contacted Area 2 and told a homicide detective about the resemblance. (Pl.'s LR 56.1(b) Resp. ¶ 68.)

Defendants McCabe, McNally and perhaps Dioguardi picked plaintiff up from the station where he was being held and transported him to Area 2. (*Id.* ¶¶ 71-72.) McNally and McCabe interrogated plaintiff and then left to gather witnesses for a line-up. (*Id.* ¶ 73.)

At about 12:30 p.m. on November 1, 1979, plaintiff was taken from Area 2 to the 5th District for the line-up. (*Id.* ¶ 74.) Detective Laverty conducted the line-up. (*Id.* ¶ 75.) McCabe and McNally were in and out of the room when the witnesses were brought in for the line-up. (*Id.* ¶ 78.)

Rounds, Nash and Williams went to the 5th District to view the line-up. (*Id.* ¶ 79.) The parties dispute whether they discussed the killer's description while they waited to view the line-up and whether they viewed the line-up singly or together. (*Compare* Pl.'s Rule 12(M) Stmt. ¶ 34,[8] 38 *with* Defs.' LR 56.1(a)(3) Stmt. ¶¶ 81-82.) Plaintiff claims that Rounds and Nash, who viewed the line-up together, were repeatedly encouraged by the police to identify plaintiff as the killer. (Pl.'s Rule 12(M) Stmt. ¶ 40.) Defendants claim that none of the police officers told Rounds whom to choose. (Defs.' LR 56.1(a)(3) Stmt. ¶ 86.) Whether they did so freely or under duress, Nash and Rounds identified plaintiff as the killer from the line-up. (Pl.'s Rule 12(M) Stmt. ¶¶ 40, 42; Defs.' LR 56.1(a)(3) Stmt. ¶ 85.[9]) Williams identified plain-

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[8] Contrary to defendants' claim, this portion of the fact statement is adequately supported by the record. (*See* Defs.' Resp. Pl.'s Rule 12(M) Stmt. ¶ 34.)

[9] Plaintiff's attempt to deny that Nash identified him from the line-up fails. The only support plaintiff cites for that denial is Rounds' July 29, 1999 affidavit in which Rounds states that he does not know whether Nash made an identification. (*See* Pl.'s LR 56.1(b) Resp. ¶ 85; *id.*, Ex. E, 7/29/99 Rounds Aff. ¶ 17.)

tiff as well. (Defs.' LR 56.1(a)(3) Stmt. ¶ 87.)[10] Each testified about their line-up identification during plaintiff's criminal trial. (*Id.*, Ex. J, 9/22/80 Crim. Tr. at 539, 880, 927-28.)

At some point on November 1, 1979, defendants McNally and McCabe searched plaintiff's house, but found no evidence that linked him to the Cohen murder. (Pl.'s Rule 12(M) Stmt. ¶ 50; *id.*, Ex. X, 11/1/79 Police Report.) They also learned, on that date, that plaintiff's fingerprints did not match those found at the crime scene. (Pl.'s Rule 12(M) Stmt. ¶ 26; *id.*, Ex. O, 4/23/85 Latent Fingerprint Examination Report.)[11] Despite the dearth of physical evidence, plaintiff was arrested for Cohen's murder the same day. (*Id.*, Ex. X, 11/1/79 Police Report.)

On September 26, 1980 plaintiff was convicted of murdering Cohen. (*Id.*, Ex. Y, 9/26/80 Crim. Tr. at 1316.) On July 14, 1995, after spending fifteen years in prison, Governor Edgar granted him a pardon on the grounds of innocence. (*Id.*, Ex. D, Pardon.)

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[10] Plaintiff attempts to deny this fact by citing to Rounds' July 29, 1999 affidavit. (See Pl.'s LR 56.1(b) Resp. ¶ 87.) Rounds, however, says nothing about Williams in that affidavit. (*See id.*, Ex. E.)

[11] Defendants attempt to deny this fact because the fingerprint report on which it is based is dated April 23, 1985 and does not specifically mention any of the defendants. (Defs.' Resp. Pl.'s Rule 12(M) Stmt. ¶ 26.) The report, however, states that the comparison of plaintiffs' fingerprints to those found at the scene was made on November 1, 1979. (Pl.'s Rule 12(M) Stmt., Ex. O, 4/23/85 Latent Fingerprint Examination Report.) Moreover, the original report on the murder, prepared by McCabe and McNally, states that various items at the murder scene were "processed for possible ridge impressions." (*Id.*, Ex. C, 10/30/79 Police Report.) Contrary to defendants' claim, it is reasonable to infer from these facts that the results of the fingerprint comparison requested by McCabe and McNally, the detectives who were assigned to the case and arrested plaintiff for the murder, were reported to them as soon as they were available.

The Legal Standard

To prevail on a summary judgment motion, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). At this stage, we do not weigh evidence or determine the truth of the matters asserted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). We view all evidence and the inferences from it in the light most favorable to the non-moving party. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir.1991) (citing *Lohorn v. Michal,* 913 F.2d 327, 331 (7th Cir.1990)). "Summary judgment is only appropriate when the record reveals that no reasonable jury could find for the nonmoving party." *Karazanos,* 948 F.2d at 335 (citing *Doe v. Allied Signal, Inc.*, 925 F.2d 1007, 1008 (7th Cir.1991)).

Discussion

Count I

In Count I, plaintiff asserts a *section 1983* malicious prosecution claim against defendants Eckner, Dioguardi, McCabe and McNally.[12] The elements of a *section 1983* malicious prosecution claim are: (1) the requirements of a state law cause of action for malicious prosecution are satisfied; (2) a state actor committed the malicious prosecution; and (3) plaintiff was deprived of liberty. *Cervantes v. Jones,* 188 F.3d 805, 809 (7th Cir.1999) (citations omitted), *cert. denied,* 120 S.Ct. 1159 (2000). To satisfy the requirements of a malicious prosecution claim under Illinois law, plaintiff must show that defendants maliciously instituted or continued judicial proceedings

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[12] In 1997, we dismissed the malicious prosecution claim against defendant James. (*See* 6/30/97 Minute Order.)

against him, for which there was no probable cause, the proceedings were terminated in his favor and he was injured. *Id.* Only two of these elements are in dispute: (1) whether there was probable cause for the prosecution of plaintiff; and (2) whether defendants maliciously instituted or continued the judicial proceedings against him. To defeat defendants' motion, plaintiff must produce evidence to suggest both that defendants lacked probable cause for the prosecution and that they pursued it with malice. Defendants, on the other hand, can defeat plaintiff's motion by producing evidence that suggests either of these elements is lacking. We will start with probable cause.

Probable cause is a "practical, nontechnical conception" that requires an "evaluation of the totality of the circumstances." *United States v. Rucker,* 138 F.3d 697, 700 (7th Cir.1998) (internal quotation marks and citations omitted). "Probable cause for an arrest exists if, at the time the arrest was made, the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person to believe that an offense was committed." *Simkunas v. Tardi,* 930 F.2d 1287, 1291 (7th Cir.1991). As Judge Shadur has noted, however, "the existence of probable cause for an arrest does not automatically translate into probable cause for the ensuing criminal proceeding." *Nielsen v. Village of Lake in the Hills,* 948 F.Supp. 786, 796 (N.D.Ill.1996). Though an arrest may be supported by probable cause, subsequently discovered exculpatory evidence might vitiate probable cause for the trial. *Id.* Thus, to determine whether there was probable cause to prosecute plaintiff, we must consider both the facts on which the arrest was based, and those that came to light between the arrest and the trial.

The parties agree that plaintiff's arrest on the murder charge was based primarily on the line-up identifications made by Nash and Rounds. They disagree, however, on the

validity of those identifications. Plaintiff asserts that they were the product of police coercion; defendants claim they were made without police interference. (*Compare* Defs.' LR 56.1(a)(3) Stmt. ¶¶ 85-86 *with* Pl.'s LR 56.1(b) Stmt. Add'l Facts ¶¶ 17-19.) It is not the Court's province to decide this factual dispute. And, as discussed below, we cannot decide the probable cause issue without doing so.

Viewing the facts in the light most favorable to defendants, as we must for the purposes of plaintiff's motion, we cannot say as a matter of law that there was no probable cause to prosecute plaintiff. There are a few undisputed exculpatory facts: (1) McCabe and McNally's knowledge that plaintiff's fingerprints did not match those at the murder scene (Pl.'s Rule 12(M) Stmt. ¶ 26; *id.*, Ex. O, 4/23/85 Latent Fingerprint Examination Report);[13] (2) the fact that their search of plaintiff's home turned up nothing that connected him to the murder (*Id.*, Ex. X, 11/1/79 Police Report); (3) the fact that John Williams viewed a photo array he thought was suggestive before identifying plaintiff as the man he saw on Loomis Street shortly before the murder (Pl.'s LR 56.1(b) Resp. ¶ 27; Defs.' LR 56.1(a)(3) Stmt., Ex. J., 9/22/80 Crim. Tr. at 545-49); and (4) the fact that Willie Smith was only shown one green Ford, plaintiff's, by the police before he identified it as being the same color and type as the one he saw leaving Bishop Street after the murder (Pl.'s LR 56.1(b) Resp. ¶ 88; Defs.' LR 56.1(a)(3) Stmt., Ex. J, 9/22/80 Crim. Tr. at 960-61). But those facts are not sufficient to vitiate the probable cause created by the undisputed inculpatory facts: Williams' identification of plaintiff (Pl.'s LR 56.1(b) Resp. ¶ 87) [14] and Smith's identification of plaintiff's car (*id.* ¶¶ 53-55, 88), and the disputed inculpatory facts that we must construe in defendants' favor: Nash and Rounds' line-up

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[13] *See* n.11.

[14] *See* n.10.

identifications of plaintiff (Defs.' LR 56.1(a)(3) Stmt. ¶¶ 85-86), Nash and Rounds' failure to identify the killer from mug books that did not contain plaintiff's picture (Defs.' LR 56.1(a)(3) Stmt. ¶¶ 57-59; Pl.'s Rule 12(M) Stmt. ¶ 25) and plaintiff's resemblance to the composite sketch (Defs.' LR 56.1(a)(3) Stmt. ¶ 66).

Similarly, when we view the facts in plaintiff's favor, as we must on defendants' motion, we cannot say that there was probable cause to prosecute. Taken together, the undisputed inculpatory facts, Williams' identification of plaintiff (Pl.'s LR 56.1(b) Resp. ¶ 87) [15] and Smith's identification of plaintiff's car (*id.* ¶¶ 53-55, 88), the undisputed exculpatory facts Williams' belief that the photo array was suggestive (*id.* ¶ 27; Defs.' LR 56.1(a)(3) Stmt., Ex. J., 9/22/80 Crim. Tr. at 545-49), the single green Ford shown to Smith (Pl.'s LR 56.1(b) Resp. ¶ 88; Defs.' LR 56.1(a)(3) Stmt., Ex. J, 9/22/80 Crim. Tr. at 960-61), the absence of plaintiff's prints from the murder scene (Pl.'s Rule 12(M) Stmt. ¶ 26; *id.*, Ex. O, 4/23/85 Latent Fingerprint Examination Report) [16] and the negative search of plaintiff's home (*id.*, Ex. X, 11/1/79 Police Report), and the disputed exculpatory facts that we must construe in plaintiff's favor, the coercion of Nash and Rounds' line-up identifications (*id.* ¶¶ 39-41), their identifications of the killer from mug books that did not contain plaintiff's picture (*id.* ¶¶ 24-25) and plaintiff's resemblance to a composite sketch that was based on input from Rounds, who now says he never saw the killer's face (Defs.' LR56.1(a)(3) Stmt. ¶ 61; Pl.'s LR 56.1(b) Resp. Ex. E, Rounds' 7/29/99 Aff. ¶ 10), are not, as a matter of law, sufficient to make a prudent person believe that plaintiff murdered Mickey Cohen.

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[15] *See* n.10.

[16] *See* n.11.

Having lost on the facts, plaintiff turns to the law. According to plaintiff, collateral estoppel establishes that there was no probable cause to prosecute him because a state court determined defendants procured his conviction by fraud when it granted his motion for discharge. We disagree.

We must give the same preclusive effect to an Illinois state court judgment as it would be given by an Illinois court. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81-83 (1984). The elements of collateral estoppel under Illinois law are: (1) the issue decided in the prior action is identical to the one currently presented; (2) a court of competent jurisdiction rendered a final judgment on the merits in the prior action; (3) the party against whom the doctrine is asserted was a party to the prior action or in privity with a party; (4) the issue was actually and necessarily litigated and determined in the prior action; and (5) the party to be estopped had a full and fair opportunity to litigate the issue in the prior proceeding. *Talarico v. Dunlap,* 281 Ill.App.3d 662, 665, 667 N.E.2d 570, 572, 217 Ill.Dec. 481, 483 (1st Dist.1996).

Even if we assume that the state court determined the probable cause issue when it granted plaintiff's motion for discharge, a fact not established by the record, the doctrine of collateral estoppel would still not apply because there is no evidence that defendants had a full and fair opportunity to litigate the issue in state court. It is undisputed that the state court granted plaintiff's motion for discharge without objection from the State's Attorney on January 4, 1995. (Pl.'s Rule 12(M) Stmt., Ex. BB, 1/4/95 Hr'g Tr. at 4.) But the record does not reveal whether any of the defendants testified during the hearing on that motion or whether they otherwise had an opportunity to defend their probable cause determination during that proceeding. Because there is no evidence that defendants had a full and fair opportunity to

litigate the probable cause issue in the state court proceeding, they are not collaterally estopped from litigating it here.

Defendants have another weapon in their probable cause arsenal as well: qualified immunity. Qualified immunity protects government officials from liability as long as their conduct "does not violate clearly established rights of which a reasonable person would have known." *Wollin v. Gondert*, 192 F.3d 616, 622 (7th Cir.1999) (internal quotation marks and citation omitted). As defendants concede, the "right of freedom from arrest without probable cause is beyond a doubt clearly established." (Defs.' Mem. Supp. Mot. Summ. J. at 8 (internal quotation marks and citations omitted).) In the probable cause context, defendants are entitled to qualified immunity if a reasonable officer, in light of the information available to the defendants at the time of plaintiff's arrest, could have believed that there was probable cause to arrest. *Wollin*, 192 F.3d at 622.

Defendants claim a reasonable officer could have believed there was probable cause to arrest plaintiff because there were "three eye witnesses who [sic] combined testimony established Newsome as the murderer." (Defs.' Mem. Supp. Mot. Summ. J at 8.) When we view the facts in the light most favorable to plaintiff, however, we must conclude that the defendants knew when they arrested him that the line-up identifications of Rounds and Nash, the only two witnesses who actually saw the killer, were coerced. (*See generally*, Pl.'s LR 56.1(b) Resp., Ex. E, Rounds' 7/29/99 Aff.) Eliminating Nash and Rounds' identifications leaves Williams' identification of plaintiff, Smith's identification of plaintiff's car, the negative search of plaintiff's home and the fact that plaintiff's fingerprints did not match those at the murder scene. No reasonable officer could have believed there was probable cause to arrest plaintiff for Cohen's murder based on the fact that Williams saw plaintiff chatting with two women in the vicinity of Cohen's store shortly

before the murder and Smith saw a car like plaintiff's leave the area *more than fifteen minutes* after the murder when plaintiff's fingerprints were not found at the murder scene and no evidence to connect him to the crime was found at his home. Accordingly, defendants are not entitled to qualified immunity on the malicious prosecution claim.[17]

To summarize, we cannot determine as a matter of law, whether defendants did or did not have probable cause to arrest and prosecute plaintiff. Because the lack of probable cause is an essential element of plaintiff's malicious prosecution claim, his motion for summary judgment on Count I is denied.

Defendants, however, can still prevail on their motion if the record establishes, as a matter of law, that they did not maliciously institute or continue judicial proceedings against plaintiff. Malice in this context, means improper acts committed by the defendants after plaintiff was arrested. *Reed v. City of Chicago,* 77 F.3d 1049, 1053 (7th Cir.1996).

There is nothing in the record that demonstrates malice on the part of defendants Eckner and Dioguardi. Even viewed favorably to plaintiff, the record reveals that the only role Eckner played in the prosecution of plaintiff was suggesting to defendant James that plaintiff resembled the composite sketch of Cohen's murderer. (Defs.' LR 56.1(a)(3) Stmt.

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[17] Quoting *Williams v. Heavner,* No. 97 C 0890, 1999 WL 91885, at * 4 (N.D.Ill. Feb. 10, 1999), defendants argue that "'the law on whether malicious prosecution gives rise to a constitutional violation was not clearly established" 'in 1979. (Defs.' Reply Mem. Supp. Mot. Summ. J. at 7.) In reality, as the *Williams* court noted, it was established in 1979 in this circuit that malicious prosecution was actionable under section 1983 if it resulted in a "deprivation of constitutional magnitude," as it did here. *Hampton v. Hanrahan,* 600 F.2d 600, 630 (7th Cir.1979), *rev'd in part on other grounds,* 446 U.S. 754 (1980); *Williams,* 1999 WL 91885 at * 4.

¶ 65.)[18] Similarly, the record shows that Dioguardi did nothing more than accompany McCabe and McNally from Area 2 to the police station at which plaintiff was being held on the Wills robbery. (Pl.'s LR 56.1(b) Resp. ¶ 71.) Because there is no evidence to suggest that defendants Eckner and Dioguardi engaged in any improper conduct after plaintiff was arrested for Cohen's murder, their motions for summary judgment on Count I are granted.

The same is not true for defendants McCabe and McNally. It is undisputed that these defendants gathered the witness for the line-up and were in and out of the room when Rounds and Nash were viewing it. (Pl.'s LR 56.1(b) Resp. ¶¶ 73, 78.) In his July 29, 1999 affidavit, which for the purposes of defendants' motion we must accept as true, Rounds claims that the officers in the room repeatedly encouraged him and Nash to identify plaintiff as the murderer. (*Id.*, Ex. E, 7/29/99 Rounds' Aff. ¶¶ 11-16.) It is reasonable to infer from these facts, as we must on summary judgment, that the officers who encouraged Nash and Rounds to identify plaintiff were McCabe and McNally. Though defendants' line-up conduct occurred before plaintiff was arrested for Cohen's murder, it was the basis for Nash and Rounds' testimony at plaintiff's criminal trial that he was the man they saw murder Mickey Cohen. Suborning perjury is sufficient to demonstrate malice. Moreover, these officers' undisputed decision not to pursue identification of the crime scene fingerprints with the FBI also suggests malice. (Pl.'s Rule 12(M) Stmt. ¶ 49; *supra,* at 10.) Because there is evidence in the record from which a jury could infer that McCabe and McNally maliciously continued the judicial proceedings against plaintiff, their motion for summary judgment on Count I is denied.

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[18] Plaintiff tries to deny this fact, but the denial does not controvert the substance of the asserted fact. (*See* Pl.'s LR 56.1(b) Resp. ¶ 65.)

Count II

In Count II of his first amended complaint, plaintiff alleges that all of the remaining defendants, James, Eckner, Dioguardi, McCabe and McNally, are liable under *section 1983* for conspiring to violate his Fourth Amendment rights. Defendants contend that the intracorporate conspiracy doctrine shields them from this claim. The Seventh Circuit first explained this doctrine in *Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir.1970)*. In that case, the plaintiff sued a real estate company and one of its building managers under section 1985 for conspiring to deprive him of his Fourteenth Amendment rights. The district court entered judgment for the plaintiff, but the Seventh Circuit reversed, saying:

> the statutory requirement that "two or more persons . . . conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm . . . . [I]f the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy . . . .

Id. at 196. In *Wright v. Illinois Dep't Children & Family Servs.*, 40 F.3d 1492 (7th Cir.1994), the Seventh Circuit extended the intracorporate conspiracy doctrine to section 1985 claims asserted against individual members of a single governmental entity because "large, bureaucratic agencies such as the DCFS are functionally the equivalent of corporations in that their employees and officials jointly endeavor to provide a product or service and reach decisions pursuant to a unified, hierarchical structure." *Id.* at 1508. In the court's view, "except in egregious circumstances, intra-entity discussions that result in discriminatory or retaliatory actions lie outside the scope of § 1985." *Id.* at 1508-09.

The Seventh Circuit has not, however, held that the intracorporate conspiracy doctrine is applicable to section 1983 cases. But *see Jones v. City of Chicago,* 856 F.2d 985, 992-93 (7th Cir.1988) (affirming section 1983 conspiracy verdict against various police officers without any discussion of intracorporate conspiracy doctrine). Nor, as far as we can tell, has any other circuit court of appeal. Some judges in this district have held that the doctrine applies to *section 1983* cases, *see, e.g ., Rojicek v. Community Consol. Sch. Dist. 15,* 934 F.Supp. 280, 281 (N.D.Ill.1996) (J. Alesia); *David v. Village of Oak Lawn,* No. 95 C 7368, 1996 WL 210072, at *4 (N.D.Ill. Apr. 29, 1996) (J. Gettleman); *Chavez v. Illinois State Police,* No. 94 C 5307, 1996 WL 66136, at *7-8 (N.D.Ill. Feb. 13, 1996) (J. Manning), though three have refused to apply it to *section 1983* cases involving police misconduct, *see Northen v. City v. of Chicago,* No. 93 C 7013, 1999 WL 342441, at *4 (N.D.Ill. May 17, 1999) (J. Holderman); *Cooper v. Harris,* Nos. 98 C 1623 & 98 C 1624, 1999 WL 261742, at *3 (N.D.Ill. Apr. 13, 1999) (J. Grady); *Salto v. Mercado,* No. 96 C 7168, 1997 WL 222874, at *1 (N.D.Ill. Apr. 24, 1997) (J. Zagel).

After reviewing the history of the doctrine, we agree with Judges Holderman, Grady and Zagel that the intracorporate conspiracy doctrine does not shield defendants from *section 1983* conspiracy claims based on the kind of police misconduct alleged here. The intracorporate conspiracy doctrine was created to shield corporations and their employees from conspiracy liability for routine, collaborative business decisions that are later alleged to be discriminatory. The conduct plaintiff challenges here does not fit that mold. The decision to frame plaintiff for Cohen's murder, as plaintiff alleges it, is not the product of routine police department decision-making. Rather, it is, as Judge Zagel put it, "a classic charge of conspiracy" in which "a number of officers took concerted action . . . to harm a single individual." *Salto,* 1997 WL 222874 at *1. If the facts bear

out plaintiff's version of events, the intracorporate conspiracy doctrine will not shield defendants from his conspiracy claim.

A conspiracy exists if there are "(1) an express or implied agreement among defendants to deprive plaintiff of his . . . constitutional rights and (2) actual deprivations of those rights in the form of overt acts in furtherance of the agreement." *Scherer v. Balkema,* 840 F.2d 437, 442 (7th Cir.1988). Plaintiff argues that both elements are satisfied by Marvin White's testimony that he "witnessed Defendants Dioguardi, James and Eckner discussing how they intended to take plaintiff 'down' because 'if he didn't kill Cohen, he killed somebody." '(Pl.'s Mem. Resp. Defs.' Mot. Summ. J. at 11.) There are two problems with this claim. First, White never identified the officers about whom he testified. Rather, he said he heard a police officer, who "sounded like the guy with the white hair," tell two other unidentified officers, that plaintiff is "going down" because "if he didn't kill Cohen, he killed somebody." (Pl.'s Rule 12(M) Stmt., Ex. K, White Dep. at 23-24.) Because plaintiff did not provide us with any facts from which we could infer the identities of those officers, we struck from plaintiff's Rule 12(M) fact statement concerning White's testimony the references to specific officers. (*See id.* ¶ 20; *supra,* at 6.) Second, even if there were proof that the "guy with the white hair" was Eckner and that he made those comments to James and Dioguardi, it would not save plaintiff's conspiracy claim because there is no evidence that James and Dioguardi agreed that the Cohen murder should be pinned on plaintiff. White testified that one officer spoke and the other two listened, not that the latter two officers said or did anything to indicate that they agreed plaintiff should be railroaded for Cohen's murder. Because there is no evidence that Dioguardi, James and Eckner agreed to violate plaintiff's rights, they are entitled to summary judgment on the conspiracy claim asserted against them in Count II.

Once again, however, the situation is different for McCabe and McNally. Viewing the record in the light most favorable to plaintiff, there are facts from which a jury could conclude that these two defendants agreed to violate plaintiff's rights and took steps to do so, including: (1) the fact that McCabe and McNally were in and out of the room when Nash and Rounds were viewing the line-up (Pl.'s LR 56.1(b) Resp. ¶ 78); (2) Rounds' testimony that the officers in that room repeatedly encouraged him and Nash to identify plaintiff as the murderer (*Id.*, Ex. E, 7/29/99 Rounds' Aff. ¶¶ 11-16); (3) Williams' testimony that the photo array the "plain clothes men" showed him was suggestive (Pl.'s LR 56.1(b) Resp. ¶ 27; Defs.' LR 56.1(a)(3) Stmt., Ex. J., 9/22/80 Crim. Tr. at 545-49); (4) Smith's testimony that the police showed him only one green Ford, plaintiff's, before he identified it as being the same color and type as the one he saw leaving Bishop Street shortly after the murder (Pl.'s LR 56.1(b) Resp. ¶ 88; Defs.' LR 56.1(a)(3) Stmt., Ex. J, 9/22/80 Crim. Tr. at 960-61); and (5) McNally's testimony that he did not ask the Chief of Detectives to send the murder scene fingerprints, which he knew did not match plaintiff's, to Washington for comparison with those on file with other government agencies because "[he] felt [he] had [the] guy" (Pl.'s Rule 12(M) Stmt., Ex. L, McNally Dep. at 230-31). Because there is sufficient evidence from which a jury could conclude that McCabe and McNally conspired to violate plaintiff's Fourth Amendment rights, their motion for summary judgment on this claim is denied.

Conclusion

For the reasons set forth above, there is no genuine issue of material fact on the claims plaintiff asserts against defendants James W. Eckner, Bruce James and David Dioguardi. The motions for summary judgment of those three defendants are, therefore, granted. Plaintiff's motion for summary judgment on Count I and the motions for summary judgment of defen-

dants' James McCabe and Raymond McNally are denied. Defendants' motion to strike paragraphs from plaintiff's Rule 12(M) Statement is granted in part and denied in part. Defendants' motion to strike the July 29, 1999 affidavit of Anthony Rounds is denied. Plaintiff's motion to strike the affidavit of Stephen Meagher is granted. Plaintiff's motion to strike the affidavit of Donald Lantz is granted in part and denied in part.

APPENDIX E

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION.

No. 96 C 7680

JAMES NEWSOME,

Plaintiff,

v.

BRUCE JAMES, JAMES W. ECKNER, DAVID DIOGUARDI, JAMES MCCABE, RAYMOND MCNALLY, THEATRICE PATTERSON, AND OLIVIA RUSSELL,

Defendants.

May 16, 2000

MEMORANDUM OPINION AND ORDER

PLUNKETT, *Senior J.*

On April 25, 2000, the Court issued a Memorandum Opinion and Order ("Order") that denied plaintiff's motion for summary judgment on Count I of his first amended complaint, granted the motion for summary judgment of defendants Eckner, James and Dioguardi and denied the motion for summary judgment of defendants McCabe and McNally. Plaintiff has filed a motion for reconsideration seeking to have the claims asserted against defendant Dioguardi reinstated. Defendants McCabe and McNally have filed a motion for reconsideration seeking dismissal of the malicious prosecution claim asserted against them on the

grounds of qualified immunity. For the reasons set forth below, both motions are denied.

The Legal Standard

Because the parties seek reconsideration of an interlocutory order, their motions are not governed by the Federal Rules of Civil Procedure. Rather, they are addressed to the Court's inherent power to modify orders in a pending case before final judgment. *Peterson v. Lindner,* 765 F.2d 698, 704 (7th Cir.1985). Final or not, however, this Court's orders are not "mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.,* 123 F.R.D. 282, 288 (N.D.Ill.1985). Thus, motions to reconsider are rarely appropriate. In the context of final judgments, our court of appeals has said that motions to reconsider should be presented only when the law or facts change significantly after the issue is presented to the Court, the Court has "patently misunderstood a party," has "made a decision outside the adversarial issues presented" to it, or has "made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales,* 906 F.2d 1185, 1191 (7th Cir.1990) (internal quotation marks and citation omitted). Such motions do not allow "a party to undo its own procedural failures, [or] . . . to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir.1996)* (citation omitted). With these principles in mind, we turn to the parties' motions.

Discussion

Plaintiff's Motion

Plaintiff contends that we dismissed his claims against defendant Dioguardi because we "misapprehend[ed]" them. (Pl.'s Mot. Recons. at 1.) Plaintiff seeks to hold Dioguardi liable, he informs us, because Dioguardi "facilitated the preparation of false police reports and provided false

testimony contradicting Plaintiff's alibi" (*Id.* at 2.) Unfortunately, plaintiff did not include the arguments and evidence he now submits in the fact statements or briefs that he submitted in support of his motion for summary judgment or in opposition to defendants' motion. As we said in the opinion, the only evidence in the summary judgment record with respect to defendant Dioguardi was that he "accompan[ied] McCabe and McNally from Area 2 to the police station at which plaintiff was being held on the Wills robbery." (4/25/00 Mem. Op. & Order at 24.) Absent some compelling explanation for the omission of this evidence, which plaintiff has not provided, we will not revisit our decision to dismiss plaintiff's claims against Dioguardi.

Defendants' Motion [1]

Defendants seek reconsideration of the Order to the extent that it denies them qualified immunity from plaintiff's malicious prosecution claim. Our court of appeals has described the analysis of a qualified immunity defense as follows: "When considering a defense of qualified immunity, two questions are pertinent: first, whether the plaintiff has asserted a violation of a constitutional right at all, and second, whether the plaintiff has demonstrated that the applicable constitutional standards were clearly established at the time in question." *Erwin v. Daley,* 92 F.3d 521, 525 (7th Cir.1996). Defendants' argument centers on the first question. In essence, they claim that the evidence in this case, at most, supports an inference that defendants arrested plaintiff without probable cause. Because an unconstitutional arrest cannot, by itself, support a section 1983 malicious prosecution claim, defendants contend that they are qualifiedly immune from liability on this claim.

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[1] Because plaintiff did not file his response to defendants' motion by May 12, 2000, as ordered by the Court, we decided the motion without it.

Defendants say that they raised this issue in their summary judgment briefs, but should have "developed [it] at greater length." (Defs.' Mot. Recons. at 2.) While it is true that defendants mentioned this aspect of their qualified immunity defense in two of their briefs, devoting three sentences to it in their reply brief and a single paragraph to it in their opposition to plaintiff's motion, they focused on the second step of the analysis, whether the right to sue for malicious prosecution under section 1983 was clearly established in 1979. (*See* Defs.' Reply Mem. Supp. Mot. Summ. J. at 7; Defs.' Opp'n Pl.'s Mot. Summ. J. at 13.) It was, as we pointed out in the opinion, if the malicious prosecution resulted in a deprivation of "constitutional magnitude," like imprisonment. (4/25/00 Mem. Op. & Order at 23 n. 17 (quoting *Hampton v. Hanrahan,* 600 F.2d 600, 630 (7th Cir.1979), *rev'd in part on other grounds,* 446 U.S. 754 (1980))); *Albright v. Oliver,* 975 F.2d 343, 346 (7th Cir.1992), *aff'd,* 510 U.S. 266 (1994) ("Malicious prosecution can result in a person's being thrown in jail to await trial, and incarceration is of course no less a deprivation of liberty within the meaning of the due process clause than exclusion from an occupation."). Defendants did not, however, separately address the first part of the analysis, that is, whether plaintiff stated a constitutional claim, and they seek to do so now.

Needless to say, defendants had ample opportunity to develop this argument in the three briefs they submitted in connection with the motions for summary judgment. Ordinarily, in the face of such an omission, we would deny the motion to reconsider without substantive discussion. However, given defendants' stated intention to file an immediate appeal of this decision, an intention they expressed before the decision was even issued (*see* Defs.' Mot. Continue Trial Date ¶ 11), we will take this opportunity to apprise the court of appeals of our view of defendants' arguments.

Defendants start with a little history. Twenty years ago, they note, arrest without probable cause was a sufficient basis for a section 1983 malicious prosecution claim. (Defs.' Mot. Recons. at 4-5 (citing *Hampton,* 600 F.2d at 630).) Today, however, a section 1983 malicious prosecution claim must be based on a constitutional violation other than unlawful arrest. *Sneed v. Rybicki,* 146 F.3d 478, 481 (7th Cir.1998). Though defendants admit that Newsome would have a viable malicious prosecution claim if there were evidence to suggest that they had violated his due process rights by suborning perjury or withholding exculpatory evidence, they claim that no such evidence exists. (Defs.' Mot. Recons. at 5-7.) In reality, viewed favorably to plaintiff, the record supports the inference that defendants did both.

Under Illinois law, a person who "procures or induces" another to commit perjury has suborned perjury. 720 ILL. COMP. STAT. 5/32-3. A person commits perjury "when, under oath or affirmation, . . . he makes a false statement, material to the issue or point in question, which he does not believe to be true." 720 ILL. COMP. STAT. 5/32-2. In his July 29, 1999 affidavit, which we must assume to be true, Rounds states that he was not able independently to identify Newsome as Cohen's killer from the lineup, that he nonetheless testified that Newsome was the killer, and that his testimony was false. (Pl.'s Rule 12(M) Stmt., Ex. G. ¶¶ 2-3, 12-16.) Those facts are sufficient to support the inference that Rounds perjured himself during Newsome's criminal trial. The evidence also supports the inference that defendants "procured or induced," that perjury. In his affidavit, Rounds says that the police "influenced [him] to implicate Mr. Newsome," despite his protestations that he could not identify the killer, and thus, the testimony he gave at Newsome's trial "was the creation of the plain clothes police officers." (*Id.* ¶ 3.) Finally, because there is no evidence that defendants told the prosecutor or the court before, during or after Newsome's trial that Rounds' identification was coerced or

his testimony was false, Rounds' affidavit also supports the inference that defendants failed to disclose exculpatory evidence.

Contrary to defendants' assertion, the information in Rounds' affidavit is sufficient to support an inference of subornation. Though Rounds does not say that he told defendants he would testify falsely, that he discussed his trial testimony with them, or that they threatened or bribed him to testify falsely, such evidence is unnecessary. Rather, the statute only requires evidence that defendants procured or induced Newsome to testify falsely, evidence that is supplied by Rounds' affidavit.

It is also sufficient to support the inference that they withheld evidence. If defendants pressured Rounds into identifying Newsome, and viewed favorably to plaintiff Rounds' affidavit suggests that they did, then, as defendants admit, they had an obligation to disclose that fact to the prosecutor. (Defs.' Mot. Recons. at 7); *see United States v. Fairman,* 769 F.2d 386, 391-92 (7th Cir.1985) ("We believe that the purposes of *Brady* would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure."). Even if it is true, defendants' alleged belief that Rounds would disclose "the events that occurred during the lineup—including the defendants' alleged misconduct—to the prosecutors, defense counsel, or the trier of fact" (Defs.' Mot. Recons. at 8), would not absolve them of liability. Because the law holds the State, not the witnesses to a crime, responsible for disclosing exculpatory evidence, defendants' alleged belief that Rounds would report his coercion to the prosecutor is irrelevant.

Defendants' contention that "a careful reading" of Rounds' affidavit destroys any inference of unconstitutional conduct is, to say the least, unpersuasive. (*Id.* at 5.) It is, to say the most, unsupported by the facts, contrary to the representations

they have previously made during this litigation, and worthy of sanctions. Their entire argument rests on one sentence from Rounds' affidavit: "I never told the police I could identify the gunman." (*Id.* at 6.) That single sentence, defendants claim, establishes that Rounds did not make any identification from the lineup. Thus, they assert, they cannot be held liable for suborning perjury or withholding exculpatory evidence because they had "every reason to believe that their efforts to influence Rounds had failed" and to conclude that Rounds decided sometime *after* the lineup "that he was able to make an identification after all." (*Id.*)

Defendants' suggestion that Rounds identified no one from the lineup is sharply contradicted by the rest of his affidavit and the representations that defendants have previously made to this Court. Read favorably to plaintiff, the essence of Rounds' affidavit is that he was unable to identify Newsome as the killer from the lineup, but ultimately did so because of pressure from the police. (Pl.'s Rule 12(M) Stmt., Ex. G ¶¶ 2-3, 12-16.) Read in context, the sentence defendants extract is merely a reiteration of Rounds' inability to independently identify Newsome, not proof that he made no identification at all.

Moreover, until now, defendants have consistently and repeatedly insisted that Rounds did in fact identify Newsome from the lineup. In their answers to Newsome's first amended complaint, McCabe and McNally each "admit[ ] that Mr. Rounds viewed a lineup and identified Mr. Newsome." (McCabe's Answer First Am. Compl. ¶ 28; McNally's Answer First Am. Compl. ¶ 28.) In the papers they submitted in support of their motion for summary judgment, they reaffirm that admission not less than seven times: (1) "Rounds picked Plaintiff out of the lineup" (Defs.' LR56.1 (a)(3) Stmt. ¶ 86); (2) "Rounds reaffirmed his identification of Plaintiff in the lineup" during Newsome's criminal trial (*id.* ¶ 93); (3) "Anthony Rounds and Josie Nash viewed a

lineup and each selected Plaintiff as the man who was in [Cohen's] store" (Defs.' Mem. Supp. Mot. Summ. J. at 3); (4) "Subsequently, a lineup was held and Anthony Rounds identified Plaintiff as the man who had a gun in Mickey Cohen's store, and who ran out of the store immediately after the shots rang out (*id.* at 6); (5) "In this case, Josie Nash and Anthony Rounds 'positively and unequivocally identified' Plaintiff James Newsome as the man who shot and killed Mickey Cohen" (*id.* at 9); (6) "On November 1, 1979, Anthony Rounds selected Plaintiff from a lineup as the man he saw in Mickey Cohen's store" (Defs.' Reply Mem. Supp. Mot. Summ. J. at 1); (7) "In the instant case, Anthony Rounds and Josie Nash viewed a lineup and each selected Plaintiff as the man who was in Mickey Cohen's store" (*id.* at 3). In light of these representations, defendants' current claim that Rounds did not identify anyone from the lineup strains the Court's credulity and defense counsel's Rule 11 obligations to the breaking point.

Even if we accepted defendants' current interpretation of Rounds' affidavit and ignored their previous representations about his identification, it would not win them qualified immunity from the malicious prosecution claim. If Rounds did not, in fact, identify Newsome from the lineup, defendants violated his due process rights by falsifying evidence and withholding that exculpatory fact from the prosecutor. The November 1, 1979 police report prepared by McCabe and McNally states: "The reporting then arranged for a line- up to be conducted at the 005th District. The witnesses, NASH, ROUNDS, and WILLIAMS were transported to the 005th District and they viewed the line-up. All three positively identified the subject James NEWSOME as being the offender in this case." (Pl.'s Mot. Recons., Ex. E, 11/1/79 police report.)[2] Because there is no evidence that

[2] Plaintiff submitted an incomplete copy of this report as Exhibit X to his Rule 12(M) Statement.

defendants ever alerted the prosecutor to the inaccuracy of that report, they would still have to stand trial on the malicious prosecution claim even if Rounds had made no identification from the lineup.

So weak are defendants' arguments for reconsideration that we can only conclude they filed the motion in an effort to extend the trial date for this case. If that was their strategy, it failed. This four-year old case, which is based on events that transpired more than twenty years ago, remains set for trial on May 22, 2000.

Conclusion

For the reasons stated above, plaintiff and defendants' motion to reconsider the Court's April 25, 2000 Memorandum Opinion and Order are denied.

APPENDIX F

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 96 C 7680

JAMES NEWSOME,

Plaintiff,

v.

BRUCE JAMES, *et al.*,

Defendants.

Oct. 17, 2001

MEMORANDUM OPINION AND ORDER

PLUNKETT, *District J.*

On July 11, 2001, the Seventh Circuit held that plaintiff's malicious prosecution claim is not a viable constitutional tort that can be redressed under 42 U.S.C. § ("section") 1983. *See Newsome v. McCabe,* 256 F.3d 747, 750-52 (7th Cir.2001). The court said, however, that the summary judgment record viewed favorably to plaintiff created a genuine issue for trial on whether the two remaining defendants, McCabe and McNally, violated his due process rights by withholding exculpatory information from the prosecutor. *Id.* at 752-53. Following that decision, plaintiff filed a second amended complaint and defendants filed a motion to assert two new affirmative defenses. For the reasons set forth below, defendants' motion is granted in part and denied in part.

Discussion

Before we turn to defendants' motion, there are some preliminary matters that must be addressed. In his second amended complaint, plaintiff renews his allegations that the defendants are sued in both their individual and official capacities. (Second Am. Compl. ¶ 7.) In 1997, we dismissed the official capacity claims plaintiff asserted. *Newsome v. James,* 968 F.Supp. 1318, 1322 (N.D.Ill.1997). He cannot revive them now. Any official capacity claims asserted against the defendants in the second amended complaint are, therefore, dismissed.

In 1997, we also dismissed the malicious prosecution claim plaintiff asserted against defendant James because the allegations against him supported only a claim for wrongful arrest. *Id.* at 1324. Those allegations, which plaintiff has renewed in his second amended complaint, are that James arrested him for the Wills robbery and that he knew or should have known the "charge was bogus." (First Am. Compl. ¶ 18; Second Am. Compl. ¶ 16.) As was true in 1997, the allegations against defendant James in the second amended complaint state only a claim for wrongful arrest. Accordingly, any malicious prosecution or due process claims plaintiff asserts in the second amended complaint against defendant James are dismissed with prejudice.

Plaintiff also asserts in the second amended complaint claims against defendants Eckner and Dioguardi, who we dismissed from the suit last year. (*See* 4/25/00 Mem. Op. & Order at 23-24.) We entered judgment in their favor on plaintiff's malicious prosecution claims because plaintiff had adduced no evidence to suggest that they had committed that tort. (*Id.*) The summary judgment record establishes that Eckner's only involvement in the events underlying this suit was noticing a similarity between plaintiff and the composite sketch of the Cohen killer. (*See* Defs.' LR 56.1(a)(3) Stmt. ¶ 65; Pl.'s LR 56.1(b) Resp. ¶ 65.) That single fact, we said,

did not support a malicious prosecution claim against Eckner. It also does not support a due process claim against him. The evidence against Dioguardi is similarly lacking. Though plaintiff alleges that Dioguardi "staged the lineup" with McCabe and McNally (Second Am. Compl. ¶ 25) and perjured himself at plaintiff's trial (*id.* ¶ 22), the summary judgment record establishes that Dioguardi did nothing more than "accompany McCabe and McNally . . . to the police station at which plaintiff was being held on the Wills robbery." (4/25/00 Mem. Op. & Order at 24 (citing Pl.'s LR 56.1(b) Resp. ¶ 71).) [1] As with Eckner, that single fact cannot support either a malicious prosecution claim or a due process claim against Dioguardi. Because plaintiff has no more factual basis for his due process claims against Eckner and Dioguardi than he had for his malicious prosecution claims against them, any claim of either variety that he asserts against these defendants in the second amended complaint is dismissed with prejudice.

The conspiracy claims against these three defendants are similarly infirm. As we said in our opinion granting summary judgment on the conspiracy count, there is simply "no evidence that Dioguardi, James and Eckner agreed to violate plaintiff's rights." (4/25/00 Mem. Op. & Order at 25.) That evidence has not changed. Thus, the conspiracy claims that plaintiff asserts against these defendants in the second amended complaint are also dismissed.

That leaves defendants McCabe and McNally. Plaintiff asserts a variety of claims against them in the second amended complaint, including claims for false arrest and malicious prosecution. (*See* Second Am. Compl. ¶ 2 (alleging

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[1] Even if there were evidence that Dioguardi had committed perjury, it would not further plaintiff's cause. As discussed more fully below, Dioguardi has absolute witness immunity from section 1983 claims arising out of testimony given at trial, even if that testimony was perjurious. *See Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

that defendants "arrest[ed][him] on a bogus charge" and "caus[ed] the Cook County State's Attorney's Office to charge him with murder without any probable cause"); ¶¶ 45-47 (alleging that defendants maliciously instituted and continued unfounded judicial proceedings against him).) As our court of appeals said, however, the false arrest claims are time-barred and malicious prosecution is not a viable constitutional tort. *Newsome,* 256 F.3d at 749, 751. Thus, any such claims plaintiff attempted to assert against McCabe and McNally are dismissed.

Finally, in Count II of his second amended complaint, plaintiff says he "seeks damages for conspiracy to commit the constitutional violations alleged in Count I." (Second Am. Compl. ¶ 2.) Defendants cannot, however, be held liable for conspiring "to commit an act that [they] may perform with impunity." *House v. Belford,* 956 F.2d 711, 720 (7th Cir.1992); *see Old Sec. Life Ins. Co. v. Continental Illinois Nat'l Bank & Trust Co. of Chicago,* 740 F.2d 1384, 1397 (7th Cir.1984) ("Civil conspiracy is an agreement of two or more people to commit *an unlawful act* . . . .") (emphasis added). Because McCabe and McNally are not liable for false arrest or malicious prosecution, they are also not liable for conspiring to commit those acts.

We turn now to defendants' motion. Plaintiff contends that the affirmative defenses defendants now seek to assert, prosecutorial and witness immunity, have been available to them since plaintiff filed his first amended complaint in February 1997. Because they failed to assert them until the eve of trial, plaintiff says, defendants have waived them.

The Court disagrees. Though the facts plaintiff alleged in his first amended complaint—that defendants failed to produce material exculpatory evidence to the prosecutor, testified perjuriously and suborned perjury—are the same as those alleged in his second amended complaint, the theory of his case is different. Initially, plaintiff was not seeking to hold

defendants liable for the acts of concealing evidence or perjury; he sought to hold them liable for maliciously prosecuting him by concealing evidence and testifying falsely. Once the Seventh Circuit scotched plaintiff's malicious prosecution claims, however, plaintiff's only recourse was to pursue defendants for the underlying acts. It was only then that the kind of prosecutorial immunity and witness immunity that defendants now seek became even arguably relevant. *See Newsome,* 968 F.Supp. at 1325 (noting that defense of absolute immunity does not apply to malicious prosecution claim). Of course, the change in theory was not plaintiff's idea. But that is beside the point. The fact is that the theory changed and equity requires that defendants be allowed to assert any defenses that they may have to the new incarnation of plaintiff's claims. *See Massey v. Helman,* 196 F.3d 727, 735 (7th Cir.2000) (noting that it would be unfair to allow "plaintiffs to change their theory of the case while simultaneously locking defendants into their original pleading"), *cert. denied,* 121 S.Ct. 2214 (2001).

Even if these defenses had been available to defendants earlier, we still would not deem them to be waived. Ordinarily, failure to plead an affirmative defense results in waiver. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.,* 811 F.2d 326, 334 (7th Cir.1987). "But when parties argue an affirmative defense in the district court, technical failure to plead the defense is not fatal." *Id.; see Vaughn v. King,* 167 F.3d 347, 352 (7th Cir.1999) (defense not waived though first asserted in pretrial order); *Dresser Indus., Inc. v. Pyrrhus AG,* 936 F.2d 921, 928 (7th Cir.1991) (defense raised for first time in reply brief in support of motion for judgment on the pleadings not waived because plaintiff "received a full opportunity to respond" to it). Because plaintiff has had ample opportunity to respond to these defenses, we would not deem them to be waived even if defendants could have asserted them earlier.

We turn now to the merits of defendants' motion. In the second amended complaint, plaintiff seeks to hold McCabe and McNally liable for violating his due process rights by "testifying perjuriously" during his criminal trial, for inducing others to do so and for conspiring to do so. (Second Am. Compl. ¶ 2.) Defendants contend that the doctrine of absolute witness immunity shields them from these claims.

Plaintiff says that we have already decided this issue against defendants. Plaintiff is mistaken. In 1997, we said defendants could not assert this defense to plaintiff's malicious prosecution claims. *Newsome,* 968 F.Supp. at 1325. We also said, however, that defendants could revisit the issue if it appeared that plaintiff was attempting to hold them liable solely for the act of testifying perjuriously. *Id.* That is precisely what plaintiff now seeks to do. Defendants are not, therefore, barred by the law of the case from asserting this defense to the second amended complaint.

Moreover, the Court agrees with defendants that absolute witness immunity protects them from these claims. In *Briscoe v. La Hue,* 460 U.S. 325 (1983), the Supreme Court held that section 1983 does not authorize "a convicted person to assert a claim for damages against a police officer for giving perjured testimony at his criminal trial." *Id.* at 326. That immunity, the Seventh Circuit has held, extends to claims of conspiracy to present perjured testimony. *House,* 956 F.2d at 720 ("[W]e fail to understand how a witness can be held liable under § 1983 for conspiring to commit an act for which he is protected from § 1983 liability by absolute immunity."). Thus, any due process claims plaintiff asserts against McCabe and McNally based on their alleged perjury or their alleged conspiracy to present their own perjured testimony are dismissed.

Even if *Briscoe* and *House* bar his perjury and conspiracy to present perjured testimony claims, plaintiff contends that they do not bar his claims based on defendants' alleged

subornation of perjury and their alleged conspiracy to suborn perjury. Unlike plaintiff, the Court does not see a distinction between suborning perjury and conspiring to present perjured testimony. One suborns perjury by inducing another to give testimony he knows to be false. In other words, one is guilty of subornation only if he secures the perjurer's agreement to present false testimony. Another name for such an agreement, of course, is a conspiracy. Thus, subornation of perjury and conspiracy to present perjured testimony appear to be two different names for the same claim. To the extent there is a difference between the two, it is not substantial enough to warrant treating them differently for immunity purposes. *See Jones v. Cannon,* 174 F.3d 1271, 1289 (10th Cir.1999) (following the reasoning of *Briscoe* and *House* and applying absolute witness immunity to section 1983 claims based on subornation of perjury). Accordingly, any due process claims plaintiff asserts against McCabe and McNally based on their alleged subornation of perjury or their alleged conspiracy to suborn perjury are also dismissed.

Plaintiff's remaining claims against McCabe and McNally are that: (1) they violated his due process rights by withholding material exculpatory evidence from the prosecutor; and (2) they conspired to do the same. Though defendants have not cited, and we could not find, any case in which police officers accused of this kind of due process violation were granted absolute immunity, defendants contend that it should be extended to them. If they, like prosecutors, have a duty to produce material exculpatory evidence, defendants argue, then they, like prosecutors, should be immune from suit for their failure to do so. In defendants' words: "If police officers are going to be held to the same *Brady* obligations as prosecutors, then, under the functional approach [of *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993)], they should be entitled to the same absolute immunity for this clearly prosecutorial function." (Defs.' Mem. Supp. Add'l Affirmative Defenses at 2.)

In reality, however, police officers are not held to the same standard as prosecutors. Prosecutors violate due process if they fail to tender to the defense, upon request, all material exculpatory or impeaching evidence. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). This is a strict liability standard; if material exculpatory evidence is not produced, *Brady* is violated regardless of the prosecutor's intent. *Id.* To satisfy their obligation, prosecutors must" ask such lawyer's questions as whether an item of evidence has 'exculpatory' or 'impeachment' value and whether such evidence is 'material.'" *Jean v. Collins,* 221 F.3d 656, 660 (4th Cir.2000), *cert. denied,* 531 U.S. 1076 (2001). Police officers, by contrast, violate due process only if they deliberately withhold or conceal exculpatory evidence from the prosecutor. *Id. at 663; Newsome v. McCabe,* 260 F.3d 824, 825 (7th Cir.2001). Unlike prosecutors, they are not accountable for failing to appreciate the ramifications of evidence they do not produce. Thus, police officers do not have to make lawyer-like determinations about whether evidence is material or impeaching to comply with their due process obligations. They simply have to refrain from concealing exculpatory evidence. Given the limited scope of their obligation—to refrain from intentional misconduct—police officers need not exercise prosecutorial discretion to comply with it.

Defendants' quest for absolute immunity also runs head long into decades of Supreme Court precedent. The Supreme Court has consistently interpreted section 1983 as providing absolute immunity only "to [those] functions intimately associated with the *judicial* phase of the criminal process." *Malley v. Briggs,* 475 U.S. 335, 342 (1986) (internal quotation marks and citations omitted) (emphasis in original). Thus, prosecutors are given absolute immunity for their acts in initiating prosecutions and presenting evidence at trial, *Imbler v. Pachtman,* 424 U.S. 409, 431 (1976) and judges are given absolute immunity for "acts committed within their

judicial jurisdiction," *Pierson v. Ray,* 386 U.S. 547, 554-55 (1967). But police officers, whose functions are further removed from the judicial process, are generally accorded only qualified immunity. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982) ("For executive officials in general . . . our cases make plain that qualified immunity represents the norm."); *Malley,* 475 U.S. at 344 (police officers have only qualified immunity from section 1983 suits arising from the act of requesting an arrest warrant); *Pierson, 386 U.S. at 555* (noting that "[t]he common law . . . never granted police officers an absolute and unqualified immunity" and holding that police officers are only qualifiedly immune from section 1983 false arrest claims); *cf. Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993) (prosecutors who "perform[ ] the investigative functions normally performed by a detective or police officer" are entitled only to qualified immunity).

Of course, a departure from the norm would be appropriate if there were compelling policy reasons to justify it. *See Butz v. Economu,* 438 U.S. 478, 506 (1978) (those who "seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope"); *Auriemma v. Montgomery,* 860 F.2d 273, 275 (7th Cir.1988) (court must consider whether performance of governmental function at issue "poses special risks of vexatious litigation" and "whether sufficient safeguards exist to prevent abuses of power" to determine whether absolute immunity is appropriate). In this case, however, no such reasons exist. Absolute immunity is not necessary to protect the personal or professional interests of police officers because they are sufficiently safeguarded by the deliberate concealment standard of liability. Because they are not accountable for negligence, they need not be consumed by evidence production decisions, to the detriment of their other duties, or fear that each decision will expose them to harassing litigation. Moreover, denying absolute immunity will better

serve the interests of the justice system as a whole. Absent section 1983 liability, the only consequence of this kind of misconduct is the reversal of a conviction, a far weaker deterrent to police misconduct than the threat of a damage award. In addition, because it will discourage this sort of behavior, denying absolute immunity will aid in the truth-seeking process, reduce the frequency of wrongful convictions and foster public confidence in the outcomes of criminal trials. In short, no compelling policy considerations militate in favor of shielding police officers from section 1983 liability for deliberately concealing exculpatory evidence. McCabe and McNally's motion to assert an absolute prosecutorial immunity affirmative defense is, therefore, denied.

Conclusion

For the reasons stated above: (1) the claims plaintiff asserts in the second amended complaint against defendants James, Eckner and Dioguardi are dismissed with prejudice; (2) the section 1983 claims for false arrest and malicious prosecution, and for conspiring to commit those acts, that plaintiff asserts in the second amended complaint against defendants McCabe and McNally are dismissed with prejudice; (3) McCabe and McNally's motion to assert the affirmative defense of absolute witness immunity is granted and plaintiff's section 1983 due process claims grounded in their alleged perjury, their alleged conspiracy to present their own perjured testimony, their alleged subornation of perjury and their alleged conspiracy to suborn perjury are dismissed with prejudice; (4) McCabe and McNally's motion to assert the affirmative defense of absolute prosecutorial immunity to plaintiff's section 1983 due process claims grounded in their alleged concealment of exculpatory evidence is denied.

APPENDIX G

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 96 C 7680

JAMES NEWSOME,

Plaintiff,

v.

JAMES MCCABE AND RAYMOND MCNALLY,

Defendants.

April 4, 2002

MEMORANDUM OPINION AND ORDER

PLUNKETT, District J.

The case is before the Court on defendants' *Federal Rule of Civil Procedure 50(b)* motion for judgment as a matter of law or, in the alternative, Rule 59 motion for a new trial. For the reasons set forth below, the motion is denied.

The Legal Standard

Judgment as a matter of law is proper only when the evidence and all reasonable inferences drawn from it are insufficient to support the verdict when viewed in the light most favorable to the prevailing party. *Cygnar v. City of Chicago,* 865 F.2d 827, 834 (7th Cir.1989.) In deciding the motion, the Court may not "resolve conflicts in testimony or weigh and evaluate the evidence." *Id.* (internal quotation marks and citation omitted). "If the evidence, taken as a

whole, provides a sufficient probative basis upon which a jury could reasonably reach a verdict," the motion must be denied. *Id.* (internal quotation marks and citation omitted).

A Rule 59 motion for a new trial should be granted if "the verdict is against the weight of the evidence, . . . the damages are excessive, or . . . the trial was [otherwise] not fair to the moving party." *Id.* at 835 (internal quotation marks and citation omitted). The motion can also be granted on the grounds of newly discovered evidence if the evidence: (1) existed at the time of trial, but was not discovered until after the trial was completed; (2) could not have been discovered before trial through the exercise of due diligence; (3) is admissible, credible, and material; (4) is not cumulative or impeaching; and (5) is likely to change the result of the trial. *Mumford v. Bowen,* 814 F.2d 328, 330 (7th Cir.1986) (setting forth elements in the context of a Rule 60(b) motion); *see Peacock v. Board of Sch. Comm'rs of Indianapolis,* 721 F.2d 210, 213 (7th Cir.1983) (*per curiam*) (noting that "the same criteria apply in evaluating 'new evidence' offered under" Rules 59 and 60).

Discussion

Defendants argue that the evidence adduced at trial shows that they are entitled to qualified immunity. Defendants are entitled to qualified immunity if their conduct "does not violate clearly established rights of which a reasonable person would have known." *Wollin v. Gondert,* 192 F.3d 616, 622 (7th Cir.1999) (internal quotation marks and citation omitted). Defendants argue that, at the time of Newsome's arrest and trial, police officers did not have a clearly established duty to refrain from concealing exculpatory evidence from the prosecutor. Our court of appeals, however, rejected this argument when it decided defendants' interlocutory appeal. In the words of the court: "[W]as it clearly established in 1979 and 1980 that police could not withhold from prosecutors exculpatory information about

fingerprints and the conduct of a lineup? The answer is yes." *Newsome v. McCabe,* 256 F.3d 747, 752 (7th Cir.2001) (citations omitted). Given that holding, defendants are entitled to qualified immunity only if the evidence presented at trial did not establish that they withheld material, exculpatory information.

Viewed favorably to Newsome, as it must be, the evidence is sufficient to overcome a qualified immunity defense. Anthony Rounds, who identified Newsome from a lineup in 1979, said that he identified Newsome only because defendants told him to do so. (R. at 190-93.) This is not the kind of evidence that "would have come out as soon as the prosecutors asked [the police] (or as soon as defense counsel interviewed the police or questioned them on the stand)," and thus, it supports Newsome's due process claim. *Newsome v. McCabe,* 260 F.3d 824, 825 (7th Cir.2001) (*per curiam*). Because Rounds' testimony, if credited by the jury, is sufficient to establish that defendants withheld material, exculpatory information from the prosecutors, they are not entitled to judgment as a matter of law on the grounds of qualified immunity.

Defendants also argue that they are entitled to absolute witness or prosecutorial immunity from Newsome's claims. As we said in our opinion on defendants' motion to assert these defenses, absolute witness immunity shields them from due process claims based on their own perjury, their subornation of perjury, or their conspiracy to present perjured testimony. (*See* 10/15/01 Mem. Op. & Order at 6-7.) It does not, however, protect them from due process claims based on their procurement of Rounds' misidentification of Newsome, a separate constitutional violation. Moreover, for the reasons set forth in our opinion on defendants' motion to assert additional affirmative defenses, we again reject their contention that they are entitled to absolute prosecutorial immunity from Newsome's claims. (*See id.* at 7-10.)

Even if they are not immune from Newsome's claims, defendants contend that they are still entitled to judgment as a matter of law because there was insufficient evidence to support the verdict. Judgment must be entered in their favor, defendants say, because: (1) Rounds' testimony was incredible; (2) even if it were worthy of credence, it does not support the inference that defendants were the officers who behaved improperly at the lineup; and (3) even if it were credible and implicated defendants, the evidence was available to the defense through the exercise of reasonable diligence, and thus, was not suppressed.[1] The Court disagrees with each contention.

First, viewed in light of all of the other evidence presented at trial, we cannot say that no reasonable jury could credit Rounds' testimony. Certainly, Rounds' prior inconsistent statements damage his credibility. But there is other evidence that bolsters it, including: (1) Dr. Wells' testimony that it is extremely unlikely that all three witnesses mistakenly identified Newsome (R. at 48-58); (2) Newsome's testimony that he saw defendants gesture to him when Josie Nash was viewing the lineup (*id.* at 539); (3) John Williams' testimony that he was shown a suggestive photo array containing Newsome's picture before he viewed the lineup (*id.* at 110-

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[1] Defendants also say that the evidence was insufficient to prove that "[d]efendants engaged in any conduct that was calculated to prevent [Rounds] from telling the truth to prosecutors." (Mem. Supp. Defs.' Post-Trial Mot. at 12.) That statement mischaracterizes both the law and the evidence. The duty to inform prosecutors of material, exculpatory evidence rests with police officers, not witnesses. Thus, defendants cannot procure a misidentification, conceal that fact from the prosecutor, and then escape liability for doing so as long as they take no further action to prevent the witness from revealing the truth. Even if that were the law, the evidence in this case would still be sufficient to support the verdict as Rounds testified that defendants told him he would be charged with perjury or contempt if he told the prosecutor the truth about the lineup. (R. at 194.)

14); and (4) defendant McNally's testimony that it is improper to show a witness a photo array before they view a lineup and that such a deviation from procedure should have been noted in the police reports about the Cohen murder (*id.* at 405-07). Given this other evidence, it was not wholly unreasonable for the jury to credit Rounds' testimony, despite its inconsistency with his prior statements.

The evidence was also sufficient to enable the jury to infer that the police officers who Rounds said influenced his identification were the defendants. Though Rounds did not identify the officers by name, Newsome testified that both defendants were present at the lineup (*id.* at 554), defendant McNally testified that he was present at the lineup (*id.* at 396-97, 409), defendant McCabe testified that he was "in and out" of the lineup (*id.* at 868-69, 873-75), and the police lineup report indicates that McCabe was present at the lineup (*id.* at 396). That testimony is ample support for the inference that defendants were the officers who influenced Rounds' identification.

Finally, the evidence does not support defendants' contention that Newsome could have discovered the problems with Rounds' identification through the exercise of due diligence. Prior to 1999, Rounds repeatedly denied that the officers had influenced his identification. (*Id.* at 213-14, 218-19, 713-15, 897-99.) Moreover, during this trial, he said that he believed he would be charged with contempt or perjury if he recanted his identification. (*Id.* at 194.) Given that evidence, there is no reason to believe Rounds would have told the truth to Newsome's counsel in 1979. The only other people who knew what happened at the lineup were the defendants themselves. And they, as plaintiff points out, "were not going to admit that they had rigged the lineup, no matter how aggressive Newsome's lawyer was in cross-examining them." (Pl.'s Resp. Defs.' Post-Trial Mot. at 9.) In short, the evidence was sufficient to support a finding that the

information defendants concealed was not otherwise available to Newsome.

Even if there is evidence that they suppressed information, defendants say that there is no evidence that the information they suppressed was material or exculpatory. Evidence is material, the jury was instructed, "if it could reasonably be taken to put the entire criminal case in such a different light as to undermine one's confidence in the verdict." (R. at 1134.) Evidence is exculpatory, the jury was told, "if there is a reasonable probability that the result of the criminal proceedings would have been different if the evidence had been disclosed to the defense." (*Id.*) Rounds was only one of three witness who linked Newsome to the murder. Thus, defendants say, even if the jury knew that the police had encouraged him to identify Newsome, Newsome would still have been convicted.

Once again, the Court disagrees. As the lawyer who prosecuted Newsome for the Cohen murder admitted, that case "rose or fell on the eyewitness identification [s]." (*Id.* at 916.) If the police improperly influenced Rounds' identification, then the integrity of the other two identifications, indeed, of the entire investigation, is called into question. The jurors knew that Newsome's fingerprints were not found at the murder scene. If they had also known that the police had tampered with Rounds' identification, there is a reasonable probability that they would have discounted the other two identifications and would have acquitted Newsome of Cohen's murder.

There was also sufficient evidence for the jury to conclude that defendants acted deliberately. In addition to coaching Rounds, there was evidence that defendants influenced Nash's identification by pointing to Newsome, influenced Williams' identification by showing him Newsome's photo before he viewed the lineup, and ignored the identifications that Rounds and Nash made from mug books that did not

contain Newsome's photo. In other words, there was sufficient evidence to support the jury's finding that defendants deliberately engaged in a pattern of misconduct to deprive Newsome of his constitutional rights.

In sum, the evidence adduced at trial was sufficient to support the verdicts against both defendant McCabe and defendant McNally. Defendants' motion for judgment as a matter of law and their motion for a new trial on the grounds that the verdicts are against the weight of the evidence are, therefore, denied.

In the alternative, defendants seek a new trial on the grounds that the Court's erroneous evidentiary rulings deprived them of a fair trial. Among the evidence the Court should not have admitted, defendants say, is: (1) evidence about the murder investigation that defendants did not suppress; (2) evidence about Newsome's pardon; (3) evidence that Dennis Emerson was the real killer; (4) the expert testimony of Dr. Wells; (5) evidence about defendants' conduct during a prior investigation; (6) evidence about the defendants' failure to disclose exculpatory evidence to the prosecutor during Newsome's motion to quash his arrest; and (7) a full-scale model of Newsome's jail cell. The Court will address each ruling in turn.

Evidence That Was Not Suppressed

Defendants say that the Court erroneously admitted evidence concerning: (1) defendants' investigation of the fingerprints found at the murder scene; (2) their failure to investigate Nash and Rounds' identification of photos from mug books that did not contain Newsome's picture; and (3) Williams' identification of Newsome from a photo array before he viewed the live lineup. In defendants' view, that evidence, which was disclosed to or was otherwise available to Newsome before his trial, is irrelevant to his due process claims.

Defendants take too narrow a view of relevance. To prevail on his claims, Newsome had to prove that defendants deliberately deprived him of his constitutional rights. Evidence that defendants could have further investigated the fingerprints and the mug book identifications, but did not, and should not have shown Newsome's photo to Williams before he viewed the lineup, is highly relevant to defendants' state of mind. Certainly, the jurors could have concluded that defendants' failure to investigate was reasonable or was the result of carelessness. But they also could have concluded that defendants made a deliberate decision to avoid lines of inquiry that might uncover exculpatory evidence, making it more likely that they also tampered with eyewitness identifications. Because this evidence could tend to prove that defendants deliberately deprived Newsome of his constitutional rights, it is relevant to his claims.

Moreover, any risk that this evidence would "suggest[ ] to the jury that Defendants had a constitutional duty to . . . discover . . . all evidence tending to exonerate Plaintiff" (Mem. Supp. Defs.' Post-Trial Mot. at 19) was cured by jury instructions. (*See* R. at 1134 (jury instructed that "[v]iolation of police department regulations" and "a police officer's failure to pursue scientific tests or similar investigative leads" do not "in and of themselves give rise to a constitutional violation").) Because this evidence was highly probative of defendants' state of mind and any risk of prejudice was cured by jury instructions, it was properly admitted.

Evidence About Emerson and Newsome's Pardon

Evidence that Dennis Emerson was the real killer and about Newsome's pardon was also properly admitted. There is no dispute that the man who murdered Mickey Cohen, who was not wearing gloves, picked up a number of items from around the store, deposited them on the counter, and left them there when he fled the scene. (*Id.* at 357, 416-17.) There is also no dispute that fingerprints found on those items

belonged to Dennis Emerson, who, at the time of the Cohen murder, was wanted for another armed robbery and murder on the south side of Chicago. (*Id.* at 320-330, 429.) Though Emerson has never been convicted of, nor has he confessed to, Cohen's murder, the chances that he was not the killer, but had been in Cohen's store sometime before the crime and touched the very same bottle of soda, quart of milk, snack cake, box of Hamburger Helper, and banana that the killer touched are infinitesimally small; so small, that they prompted the governor of the State of Illinois to pardon Newsome on the grounds of innocence. Under the circumstances, the assumption that Emerson was the real killer is a valid one.

Even if it is proper to assume that Emerson is the murderer, defendants say that evidence about him still should have been excluded because it is not relevant to the due process claim and would encourage the jury to impose liability regardless of fault. The Court disagrees. Defendant McNally testified, based on his thirty-one years of experience as a police officer, that criminals tend to commit the same kinds of crimes over and over again, and tend to do so in the same general area. (*Id.* at 437-38, 440.) The defendants knew that Newsome's prints were not on the several items handled by the killer. Yet, they did not try to determine how many black men matching the description of the Cohen killer were wanted for murder and armed robbery on the south side of Chicago. (*Id.* at 438.) In light of that testimony, evidence that Emerson matched the description of the Cohen killer and was wanted for armed robbery and murder on the south side of Chicago at the time of the Cohen murder (*id.* at 439) could be considered by the jury in determining whether the defendants intentionally manipulated eyewitness identifications in order to close a case.

Moreover, we do not believe that the admission of that evidence encouraged the jury to impose liability without

fault, given the jury instructions in this case. Among other things, the jury was told that: (1) defendants could only be held liable for a constitutional deprivation; (2) not every injury inflicted by a police officer constitutes such a deprivation; and (3) no deprivation occurred if Newsome's injury was the result of reasonable conduct, an accident, carelessness, or any other innocent reason. (*Id.* at 1130-31.) In short, the probative value of the Emerson evidence outweighed any possible prejudice to defendants. Accordingly, we believe that it was properly admitted.

It was also proper to admit evidence about the pardon. The issue in this case was not, as defendants point out, whether Newsome was guilty or innocent of the crime. But that is what it would have become if the fact of Newsome's innocence—and it was a fact once he was pardoned, *see People v. Chiappa, 368 N.E.2d 925, 926 (Ill.App.Ct.1977)* (stating that "the guilt of the defendant is absolved by pardon . . . where the same states that it is based upon the innocence of the defendant")—had been kept from the jury. Excluding that evidence would have been highly prejudicial to Newsome. It would have invited the jurors to draw the impermissible inference that he was actually guilty, and, thus, absolve defendants of any misconduct. Admission of this evidence was not, however, prejudicial to defendants. As we noted above, any temptation the jurors may have had to impose liability without fault was vitiated by the jury instructions. (*See* R. at 1130-31.) Accordingly, there was no error in the admission of this evidence.

Expert Testimony

Defendants also challenge the admission of Dr. Gary Wells' expert testimony. Dr. Wells is widely recognized as one of the leading experts in the United States on eyewitness identification and misidentification. He has written and published extensively on these subjects and, as defendants

concede, is qualified as an expert in this field. (10/15/01 Hr'g Tr. at 57; *see* R. at 27- 34.)

In summary, Wells testified as follows. First, he said extensive research shows that witnesses who see a lineup in which the perpetrator is not present and on whom no external influence is brought to bear, make a relative best choice; that is, they choose the lineup member that most resembles the perpetrator. (*Id.* at 35-37.) This, he said, is called the "natural error." (*Id.*) To determine whether the witnesses in this case made the natural error when they chose Newsome from the lineup, Wells conducted a study using photographs of Emerson and the lineup. (*Id.* at 39-40, 42-44.) He showed a photograph of Emerson to each person for fifteen seconds. Then he took the photo away and showed each person the photos of the Newsome lineup and asked them to pick from the lineup the person they just saw in the photograph. (*Id.* at 42-46.) In the first phase of this study, Wells used an undated photo of Emerson and showed it to 50 people. (*Id.* at 42-44.) In the second phase, he used a photo of Emerson dated February 12, 1980, roughly three months after the murder, and showed it to 500 more people. (*Id.* at 40, 42, 47.) According to Wells, none of the first 50 people and only 15 of the subsequent 500 people in the study, or 3%, chose Newsome from the lineup after seeing a photo of Emerson. (*Id.* at 51-52.) Wells said he used the chi-square statistic to determine the error rate of his study and found that the chance the pattern he observed was due only to chance was less than 1 out of 1,000. (*Id.* at 50-51.) Because only 3% of the study subjects chose Newsome for Emerson and, as a statistical matter, it was extremely unlikely that those results were due to chance, Wells concluded that the witnesses' misidentification of Newsome was not a natural error of misidentification, but was the product of external influence. (*Id.* at 57-58.) Finally, Wells said, though the chance that any 1 of the 3 witnesses chose Newsome without external influence was 3% or 3 out of 100, the chance of all three

witnesses choosing Newsome for Emerson without external influence was approximately 1 out of 37,000 ((3 out of 100 x 3 out of 100) x 3 out of hundred = 27 out of 1 million or 1 out of 37,000). (*Id.* at 52-57.)

Defendants contend that Wells' testimony should have been excluded because it does not comport with *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).* According to *Daubert,* a witness qualified as an expert should be allowed to testify only if his testimony consists of "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. Among the factors to be considered in determining whether expert testimony is admissible are: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) whether the theory or technique has achieved "[w]idespread acceptance." *Id.* at 593-94. The focus of the inquiry, according to the *Daubert* Court, "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

Defendants' argument centers on the first element of *Daubert.* They contend that Wells' testimony did not consist of scientific knowledge because: (1) his opinion is based on the unsupported assumption that Emerson is the real killer; (2) he used an untested methodology; (3) he compared his test results to a scientifically unproven norm; and (4) he provided no indication of the error rate. (Mem. Supp. Defs.' Post-Trial Mot. at 24.)

The first contention is easily dispatched. As discussed above, Dr. Wells' assumption that Emerson was the real killer is amply supported by the evidence in this case. Moreover, defendants' argument that it is not goes to the weight of his testimony not its admissibility. Defendants were free to, and did, point out on cross-examination that Wells' conclusions

were premised on the unproven assumption that Emerson was the killer. (R. at 61.) That, however, is an attack on the validity of Well's conclusion, not on the science behind it.

Defendants' second contention, that Wells used a scientifically untested methodology, is also refuted by the record. Wells testified that the method he used—showing people a photo of a perpetrator, taking the photo away, and asking them to choose the perpetrator from a photo array—is an accepted method of researching eyewitness identifications and has been used in numerous published, peer-reviewed studies. (*Id.* at 47-48.) Despite this testimony, defendants assert that Wells' methodology is unsound because there is no evidence that *his* study—in defendants' words, "an initial survey of 50 persons with an undated photograph of Emerson and then a survey of 500 persons with a photograph of Emerson dated four months after the murder" (Mem. Supp. Defs.' Post-Trial Mot. at 24)—was subject to peer review. *Daubert,* however, does not require Wells to demonstrate that this exact study has been scrutinized, and is accepted, by the psychological community. Rather, it requires him to show that "the reasoning or methodology underlying [it] is scientifically valid." *Daubert, 509 U.S. at 592-93.* That he did. (R. at 47-50.) The fact that the photos Wells used may not have accurately depicted Emerson's appearance on the day of the crime may undermine the credibility of his conclusions or provide a rich field for cross-examination. The defendants argued this very point in their closing. (*Id.* at 1095-97.) It does not, however, invalidate his methodology.

The Court is also not persuaded by defendants' claim that Wells compared his test results to a scientifically unproven norm. The norm Wells used was the natural error of misidentification, which he said occurs when witnesses pick the lineup member that most resembles the perpetrator. (*Id.* at 35-37.) According to Wells, the natural error principle was derived through the scientific method and is accepted by

members of his discipline (*id.* at 30- 32, 35-37), testimony that refutes defendants' claim.

Defendants' last contention, that Wells gave no indication of the error rate, is also contradicted by the record. Wells testified that he used the chi-square statistic to calculate the error rate of his study, *i.e.,* the likelihood that the results he obtained did not actually reflect a pattern of choices but were due simply to chance. (*Id.* at 50-51.) That statistical analysis, Wells said, indicated that the chance the pattern he observed was due solely to chance was less than 1 out of 1,000. (*Id.* at 51.) Thus, defendants' concern about the error rate is unfounded.

Wells' testimony also comports with the Supreme Court's opinion in *General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997)* (noting that focus of *Daubert* inquiry should be on methodology, but saying that expert testimony should be excluded if "there is . . . too great an analytical gap between the data and the opinion proffered"). In Wells' study, only 15 of 500 subjects, or 3%, chose Newsome for Emerson as the result of natural error. Wells tested those results for error and concludedthat the chance his results were due merely to chance was less than 1 out of 1,000. Because the error rate was low, Wells concluded that his results were reliable and that the chance of any one witness choosing Newsome for Emerson due to natural error was 3% or 3 out of 100, the chance of 2 witnesses doing so was 9 out of 10,000, and the chance of 3 doing so was 27 out of 1,000,000 or 1 out of 37,000. Given those numbers, Wells opined that Rounds, Williams, and Nash had not made the natural error, but chose Newsome because of external influence. There is no gap between that data and Wells' opinion, which, despite defendants' efforts, the jury apparently credited.

Wells' testimony also meets the second requirement of *Daubert* because it helped the jury determine a fact in issue. The jury knew that Newsome had been misidentified as

Cohen's killer because he was innocent of the crime. The question they had to answer was why. In other words, did each of the witnesses make a good-faith mistake or did the defendants tamper with their identifications? Wells' testimony about: (1) how identification errors generally occur; (2) how they occurred in his study; and (3) the kinds of actions that can influence identifications was helpful to answering that question.

In sum, Wells is an admitted expert in the field of eyewitness identification, his methodology is generally accepted in his field and has been subjected to peer review, and his study has an error rate of less than 1 out of 1,000. Moreover, his data fully support his conclusions and his testimony helped the jury resolve a key issue in the case. Because Wells' testimony constitutes scientific knowledge that was helpful to the jury, it is admissible within the meaning of *Daubert.*

Evidence About the Defendants' Prior Conduct

When he was questioned by plaintiff's counsel, defendant McNally said that he had no independent recollection of the Newsome lineup, but that he "wouldn't rig a lineup." (R. at 407-08.) When defense counsel questioned him, however, he said affirmatively that neither he nor McCabe had in any way encouraged any of the witnesses to identify Newsome. (*Id.* at 479.) On redirect, when plaintiff's counsel asked McNally if he actually remembered that he did nothing improper at the lineup or if he said he had not because he never would have done such a thing, McNally said it was the latter. (*Id.* at 489.) Based on this testimony, the Court allowed plaintiff to introduce evidence that he and defendant McCabe had, on a prior occasion, shown a photo of a murder suspect to a witness before the witness viewed and identified the suspect from a lineup. (*Id.* at 890-92.)

Defendants argue that this evidence should have been excluded because it was not impeaching. In their view, McNally's admission that he and McCabe had, in another investigation, shown a photo of a murder suspect to a witness before the witness viewed a lineup does not constitute rigging a lineup. As such, defendants say, it does not impeach his testimony that he would never do such a thing.

The Court disagrees. Defendant McNally testified that it was not proper procedure to show a photo array to a witness who was going to view a lineup. (*Id.* at 405-07.) Wells testified that showing the suspect's photo, singly or in an array, to a witness before she views a lineup can influence the witness' lineup identification. (*Id.* at 37-38.) Given that evidence, McNally's admission that defendants had, in a previous investigation, shown a photo of a suspect to a witness before the witness viewed a live lineup impeaches his testimony that he "wouldn't rig a lineup." The prior conduct evidence was, therefore, admissible.

Evidence that Defendants Did Not Disclose Evidence During Motion to Quash

Over defendants' objection, the Court allowed plaintiff's counsel to question Mr. Lippner, one of the state's attorneys assigned to the Cohen murder case, about the timing of defendants' disclosure of the circumstances surrounding Williams' identification of Newsome. Plaintiff was trying to show that defendants did not voluntarily tell the prosecutors that Williams had viewed a photo array before he made his lineup identification. Rather, they admitted their actions only after Williams testified about them in a June 1980 suppression hearing. Evidence that defendants were, in essence, forced to disclose the circumstances surrounding Williams' identification certainly would have been admissible because it bears on their state of mind.

The admissibility question is, however, moot because no such evidence was actually elicited from Mr. Lippner. When plaintiff's counsel asked him whether defendants disclosed the circumstances surrounding Williams' identification at the hearing on Newsome's motion to quash his arrest, he said he did not recall. (*Id.* at 925.) Lippner also said he did not recall whether Williams testified during that hearing, let alone whether he did so before defendants, and, thus, was the first to mention the photo array. (*Id.* at 926-27.) In fact, Lippner said nothing from which the jury could infer that defendants reluctantly or belatedly disclosed this evidence to him. As a result, defendants could not have been prejudiced by his testimony.

Full-Scale Model of Newsome's Jail Cell

Defendants' last evidentiary challenge is to the Court's decision, during the damages phase of the case, to allow the jury to view briefly a full- scale model of Newsome's jail cell. Defendants say that decision was erroneous because the model, which contained no bedding or personal items, did not accurately depict Newsome's cell and that it impermissibly invited the jury to determine damages by "put[ting] themselves in Plaintiff's shoes." (Mem. Supp. Defs.' Post-Trial Mot. at 28.)

The Court disagrees with both propositions. The most critical feature of the cell exhibit was its size, which defendants admit was accurate. (*Id.* at 27.) Though the model contained no bedding or personal items, any risk of erroneous inference that might have arisen from their absence was eliminated when defense counsel told the jury that Newsome had such items in his cell. (R. at 1191-92.) Defendants could have, but did not, question Newsome about the contents and conditions of his cell. Therefore, they cannot complain now about a perceived defect that they could have cured at trial.

Moreover, the model was not inflammatory. The model, unlike an actual jail cell, was in pristine condition: clean, odorless, and unblemished. Nor was it an invitation to the jury to put itself in Newsome's place. It was simply a demonstrative exhibit that provided a context for Newsome's testimony about the suffering he endured in prison. The jury was only permitted to view the model for approximately ten minutes. Each side was permitted to briefly summarize its appearance. The model was then taken away and never seen again by the jury. For all of these reasons, we believe the cell model was properly admitted.

Newly Discovered Evidence

After the trial, defendants discovered that Newsome had been arrested in Minnesota shortly before the trial for possession of heroin with intent to deliver. According to defendants, that information, coupled with the facts underlying his 1999 drug conviction, is admissible evidence that Newsome is involved in an ongoing criminal enterprise. That evidence, they say, could have been used "to attack Plaintiff's credibility," and thus, entitles them to a new trial. (Supp. Mem. Supp. Defs' Post-Trial Mot. at 3.)

Impeachment evidence does not, however, constitute grounds for a new trial. *Mumford, 814 F.2d at 330.* Moreover, even if it did, only admissible impeachment evidence would carry the day. *Id.* As a general rule, only the fact of a conviction, not the facts underlying it, are admissible to impeach. *FEDERAL RULE OF EVIDENCE 609(a); see Campbell v. Greer, 831 F.2d 700, 707 (7th Cir.1987)* (noting that "opposing party may [not] . . . parade [the witness' crime] lovingly before the jury in all its gruesome details," but is limited to introducing "the crime charged, the date, and the disposition"). Similarly, evidence about arrests and other prior misconduct are not admissible for impeachment purposes unless they bear on a witness' truthfulness. *FEDERAL RULE OF EVIDENCE 608(b); United States v.*

Miles, 207 F.3d 988, 993 (7th Cir.2000) (noting that not all misconduct suggests untruthfulness); *United States v. DeStefano,* No. 94 CR 116, 1995 WL 398763, at *7-8 (N.D. Ill. June 29, 1995) (excluding extrinsic evidence of witnesses' drug arrests under Rule 608(b) because they did not "involve[ ] dishonesty"). Thus, evidence about the facts underlying Newsome's 1999 conviction and about his 2001 arrest are not admissible to prove that he is not worthy of belief.

Defendants argue, however, that they would use this evidence not to attack Newsome's character generally, but to impeach his testimony that, apart from the wrongful murder conviction, he was an upstanding citizen who had no difficulties with the law. The problem with this argument is that Newsome never actually said that. He did not testify that he had not had any problems with the law since his release from prison. Nor did he say that he had not used, possessed or sold drugs in that time. On the contrary, he admitted that he was convicted in 1999 for possession of illegal drugs. (R. at 546.) Moreover, though plaintiff's counsel may have tried to portray him as a model citizen, Newsome's actual testimony supports the less flattering inference that he was a rootless young man who, after adapting to the chaos and brutality of prison life, was having difficulty returning to "normal" life and had recently been convicted of a drug offense. (*See id.* at 546, 1236-70.) Because Newsome never testified that the Cohen murder conviction was the only blemish on an otherwise exemplary life, and that is not the only conclusion that can be drawn from his testimony, neither the facts underlying his 1999 conviction nor his 2001 arrest would impeach his testimony.[2]

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[2] If the facts underlying his 1999 conviction or his 2001 arrest evidenced gang membership that evidence might be impeaching because Newsome testified at length about his refusal to join a gang in prison and the hardships he endured because of it. But his 1999 conviction and

Defendants also contend that this evidence could have been used "to rebut Plaintiff's claims of damages caused by the stigma of his incarceration." (Supp. Mem. Supp. Defs' Post-Trial Mot. at 3.) That stigma, Newsome testified, makes him reluctant to tell people about his prison experience and fearful that when he does it will scare them away. (R. at 1265-66.) Even if, as defendants assert, Newsome's recent legal problems suggest that he is involved in a continuing criminal enterprise, that evidence would not rebut his claim that he believes disclosure of his fifteen-year prison stay will adversely impact his personal relationships.

Even if it did, it would still not win defendants a new trial because this evidence is not likely to have changed the outcome of the proceeding. *See Mumford,* 814 F.2d at 330 (new trial motion should be granted only if newly discovered evidence "is likely to change the outcome"). The bulk of Newsome's damage testimony was devoted to the suffering he endured in prison, testimony that the proffered evidence does not rebut. Because the result of the trial would likely have been the same even if this evidence had been admitted, it does not provide a basis for granting defendants' motion.

Defendants also say that they should have been able to introduce evidence that Newsome purchased a $53,000 car the same year that he reported just over $17,000.00 in adjusted gross income to the Internal Revenue Service. Even if this were highly relevant evidence, and it is not, it would not warrant a new trial. To succeed on their motion, defendants must show that this "newly discovered evidence" was not available to them before trial through the exercise of due diligence. *Id.* They have made no showing that they requested information about Newsome's automobile purchases or spending habits during discovery or that this

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subsequent arrest suggest that he uses or sells drugs, not that he belongs to a gang.

information was otherwise unavailable to them. Absent that showing, the "discovery" of this evidence is not grounds for a new trial.

Finally, defendants say that Newsome neglected to tell them that he had received unemployment benefits in 2001, information they would have used to bolster their impeachment of Newsome with his post-release criminal conduct. As discussed above, however, further evidence of his recent legal problems is inadmissible and impeachment evidence does not, in any event, advance defendants' cause. Moreover, outside of impeachment, this evidence has no relevance. Newsome did not, for example, claim that he had lost wages because of his checkered past, or that the murder conviction made him ineligible for government benefits. As such, the fact that he received unemployment benefits, even if it was concealed from defendants, does not provide a basis for a new trial.[3]

Conclusion

For the reasons set forth above, defendants' *Rule 50(b)* motion for judgment as a matter of law, or in the alternative, Rule 59(a) motion for a new trial is denied. This is a final and appealable order.

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[3] In their opening memorandum, defendants also argued that Newsome had not disclosed his move to Minnesota to them, an omission that deprived them of impeachment material. Impeachment evidence, of course, is not grounds for a new trial. *Mumford*, 814 F.2d at 330. Even if it were, defendants waived this argument by failing to include it in their supplemental memorandum on newly discovered evidence. Finally, even if they had not waived this argument and it could provide a basis for a new trial, it would still be unavailing as Newsome's Minnesota address, which was listed in the final pretrial order, was available to defendants before the trial.